PEOPLE`S OWN SAVINGS BANK

Versus

CHARTER PROPERTIES (PVT) LTD

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
CHILIMBE J
19 July 2023 and 28 February 2024

N. Chidembo for applicant
N. Musengwa with *W. Musikadi* for respondent

Opposed application

CHILIMBE J

BACKGROUND

[1] The applicant ("POSB") prays for an order in the following terms; -

i) "Condonation of the late filing of an application for rescission of a default judgment entered into on 27 January 2023 under HCHC 485/22 ("application for condonation"); and
ii) The rescission of the said default judgment under HCHC 485/22 ("application for rescission").

[2] At the heart of the dispute is a landlord (respondent or "Charter Properties") and tenant (POSB) relationship. POSB is a registered commercial bank. The parties entered into a lease agreement sometime in 2018. By such agreement, POSB leased premises described as Shop 18, Chiyedza House, Kwame Nkrumah Avenue in Harare to operate a branch of its banking business.

[3] In its claim before the court, Charter Properties alleged breach of the agreement in that POSB failed to settle, despite notice, its rental and operating cost obligations. Charter Properties issued summons on 30 November 2022.The summons were served on POSB on 5 December 2022.Default judgment was then obtained on 27 January 2023 and served on

POSB 2 February 2023.The default order granted Charter Properties` prayers for (a) confirmation of cancellation of the lease agreement, (b) ejectment of POSB, (c) payment of arrear rentals (d) payment of holding over damages, and (e) costs of suit.

[4] A writ was taken out in this court on 10 February 2023.It was served on POSB on 13 February 2023.Despite protestations, the writ was executed with POSB being ejected from the premises. In paragraph 8.20 of Mr. Johnson Masango, the Projects and Administration Manager, POSB set out the purpose of the present application as follows; -

> "Aggrieved by the Respondent`s conduct (of pursuing litigation when the cause had been resolved and a settlement been deliberated), the Applicant has approached this Honourable Court seeking that the default judgment under HCHC 485/22 be set aside"

[5] In addition, POSB had an even more compelling reason. Paragraph 8.21 of the founding affidavit expressed it as follows; -

> "As a financial institution and statutory body, the default judgment under HCHC 485/22 has significant repercussions on the Applicant including its credit records, ability to attract lines of credit, and its reputation. The present application is therefore not moot, academic, or an abuse of court process. It is of great importance to the Applicant and its overall business operations."

[6] In pursuit of that objective, POSB thus seeks condonation for failure to file its application for rescission of judgment within the ten (10) day period prescribed by r 15 (1) of the High Court (Commercial Division) Rules SI 323/20 (the "Commercial Court Rules"). The grant of such condonation will enable POSB to move its application to have the default judgment set aside. And with the judgment set aside, POSB will then be able to defend the suit brought against it by its former landlord. The suit seeking cancellation, ejectment, arrear rentals, holding over damages and costs. All of which have effectively been settled or addressed.

[7] The relief sought is opposed by Charter Properties. Its main argument is that the controversy between the parties has dissipated. The original contract of tenancy and

consequences thereof have effectively been put to rest. The tenant settled the outstanding amounts and has also relinquished its occupancy. On that basis, Mr. *Musengwa* for Charter Properties then raised as a preliminary issue. He contended that execution of the default judgment had rendered the matter moot. I invited the parties to argue the point together with the merits and deferred my ruling.

THE APPLICATION FOR CONDONATION

[8] It is an established position that a party in breach of the rules of court must seek the court`s indulgence via an application for condonation. In order to move the court and earn its reprieve, quest, an applicant must meet certain requirements. Such an application is not granted as a matter of routine.

[9] I may observe in passing that the parties agreed that both applications (for condonation and rescission) be concomitantly argued. Counsel drew solace for their consensus from this court`s decision of *Tenke Fungurume Mining SA v Bruno Enterprises (Pvt) Ltd* HH 478-19. The court in that matter, adopted what has been termed as the "hybrid" or "rolled up approach". It simultaneously heard the condonation and rescission applications placed before it. TAGU J also made a survey of the authorities utilising that dual facility in *Rutendo Housing Cooperative v Aaron Kumanja & 10 Ors* HH 835-22[1].

[10] Similarly, in *Read v Gardiner & Anor* SC 70-19, the Supreme Court opined on that combination and held at page 11 that; -

> "Furthermore, it also seems expedient, in order to expedite the finalisation of the matter, that the application for rescission be adjudicated at the same time as the application for condonation. In my view, there is nothing in principle to preclude the composite adjudication of the two applications together, especially as the considerations to be applied in the determination of both applications are virtually identical."

[1] The court referred inter-alia to *Environmental Management Agency and Director General, Environmental Management Agency v Angel Hill Mining Company (Pvt) Ltd* HH 706-21, and *Pauline Mandigo v Tadzoka Paswarayi & Ors* HH 244-18. See also *Redan Gas (Pvt) Ltd v Mashora* HH 702-22; *Jefferson Banda & Ors v Walter Taranhike & Ors* HH 875-22; and also, comparatively *Tendai Richman Chigodora v The State* HH 47-20; *Moyo v Moyo & 2 Ors* HB 33-06.

[11] The final order issued by the Supreme Court in that decision is instructive. The appellate court directed the court *a quo* to hear and determine the condonation application first before dealing with the rescission application. In the same vein, regard must also be had to decisions such as *Charles Victor Gurupira & Anor v The Sheriff of Zimbabwe NO and 2 Ors* HH 80-08 and *Treviglo Services v Emmerson Gwatidzo* HH 272-14. Therein, this court proposed what I consider a stricter approach to rolled-up applications for condonation and rescission.

[12] The above decisions traversed *en passant* basically point to one constant. A breach of the rules of court will stall the guilty` party`s suit. Such party ought to secure the court`s clemency before the prosecution or defence of rights can progress. And the court`s indulgence will only be granted if he satisfies a set of well-established requirements.

[13] Condonation is not one to be had, as the authorities say, for the mere asking. (See *Kombayi* v *Berkhout* 1988 (1) ZLR 53 (S) 57G-58A; *Kodzwa v Secretary for Health & Another* 1999(1) ZLR 313 (S); *Sibanda v Ntini* 2002(1) ZLR 264; *Zimslate Quartzite (Pvt) Ltd & Ors* v *Central African Building Society* SC 34-17; *Read v Gardiner & Anor* SC 70-19). The requirements were listed in *Read v Gardiner & Anor* as follows

i. The extent of the delay involved or non-compliance in question.
ii. The reasonableness of the explanation for the delay or non-compliance.
iii. The prospects of success should the application be granted.
iv. The possible prejudice to the other party.
v. The need for finality in litigation.
vi. The importance of the case.
vii. The convenience of the court.
viii. The avoidance of unnecessary delays in the administration of justice.

[14] The above considerations must be balanced and considered cumulatively. This is the approach recommended by this court in *Chiweza & Anor* v *Mangwana & Ors* HH 186-17[2], *per* Dube J [as she then was] at p.4, 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

[2] Cited with approval in *Read v Gardiner* (supra).

> 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 endeavour [*sic*] to be fair to all the parties involved."

[15] *Read v Gardiner* further held that the prospects of success to be considered related to both the rescission application as well as the main dispute on the merits. This pointer leads to a timely reminder on the purpose of the facility of rescission of judgment. MATHONSI J (as he then was) in *Patience Mafu v Freeman Biba Ncube & Anor* HH 4-16 stated thus at page 1 [3];-

> "Why would a party approach the court for a rescission of a rescission of judgment order unless proceeding with the main cause is so calamitous that it cannot be contemplated? For one thing such party would have obtained a default judgment which would have been rescinded by the court thereby paving the way for the resolution of the main matter once and for all on the merits. To then spend time, energy and money trying to reverse the process and revert to the default judgment *status quo* is, in my view, a trifle. As it is, considering that this matter is being argued exactly a year after the application was filed, means that another year has been lost in trying to hang onto a default judgment when the merits of the matter would have been determined by now. Could it be that the applicant sees something in that default judgment which none of us can see."

[17] On the basis of the above, I now advert to the present application. I commence with the extent of delay, non-compliance and explanation thereof. POSB failed to file a plea,

[3] The learned judge was restating his remarks in an earlier decision being *Kwaramba v Winshop Enterprises (Pvt) Ltd and others* HC 788/15

paginated bundle of documentary evidence as well as a summary of evidence within 7 days of service of summons. These requirements are set out in r 12 (1) and (2) of the rules.

[18] The non-compliance traces back from 5 December 2023 (date of service of summons) until the judgment was taken on 27 January 2024.No action was taken even though default judgment was brought to its attention on 2 February 2024 and writ served on 13 February 2024.The present application was only filed on 8 March 2024. In particular, POSB had ample opportunity to file its application for rescission of judgment within the ten (10) days prescribed by r 15 (1) of the rules.

[19] The purpose of such pleadings is primarily to prepare for the speedy disposal of disputes. Once the entire deck of papers is placed before the court, the contesting parties as well as the court are placed in good stead to understand the nature of the dispute. Such understanding in turn, opens up the various case resolution options provided for under rr 16 to 24 dealing with pre-trial, case management and scheduling of cases.

[18] In this regard, POSB`s non-compliance was substantial. It was not of such nature as could be easily cured by an upliftment of bar for instance. In order to undo the effect of POSB`s breach, the court must wade through two fully-fledged applications. The consequences of non-compliance are inimical to the established principle of achieving finality to litigation

[19] POSB tendered the following explanations; -firstly, upon receipt of the summons, Mr. Masango says; -

> "Upon service, I reached out to the Respondent`s representatives regarding this newfound development. The representatives undertook to attend to the issue."

[20] This response is telling. Especially if read together with paragraph 8.21 of the deponent`s founding affidavit. The response does not furnish details regarding the nature of engagements, the persons involved as well as the specific resolutions forged. POSB was faced with (unjustified) litigation. There is no explanation tendered as to why matter was not instantly escalated to the legal department.

[21] In the absence of assurances that Charter Properties were going to relent or withdraw, the decision not to defend the matter was so unwise as to be nearly unbelievable. The effort expended toward settlement are disputed. And no consensus or reprieve was extracted. POSB could not have been in any doubt as regards Charter Properties` belligerent stance. They had preceded litigation by issuing a notice, cancelling the lease and declaring breach.

[22] Secondly, upon receiving the default judgment on 2 February 2023, POSB again sought to engage Charter Properties. But again no progress was attained. Still, POSB did not see it fit to approach the court for intervention. Thirdly, a writ was taken on the 10th and served on 13 February 2023. POSB remained hopeful that the matter could be resolved by negotiation. Their faith was rewarded with execution. And fourthly, only then was the matter referred to POSB`s legal department.

[23] From the aforegoing, I find POSB`s decisions, steps and explanations, given the peril they faced, quite unsatisfactory. POSB had ample opportunity to arrest the slide to procedural disaster in the form of the default judgment. And even after such was taken, they placed faith in a process which was clearly yielding no traction.

[24] Whilst parties are urged by all means to attempt and resolve disputes out of court, such attempts must be wary of the running *dies* as well as rules of court. (See *Gurupira & Anor v The Sheriff of Zimbabwe N.O* HH 80-08; *Moyo v Sibanda* HB 125-11, and *Hamilton Insurance (Private) Limited v Nomatter Makiwa and Insurance Council of Zimbabwe* HH 63-23.) POSB`s imprudence before and after the issuance of summons amounted to dereliction.

[25] I now proceed to deal with the prospects of success, and on this point-the question of mootness. This matter rests squarely on the causa upon which the default judgment was eventually granted. KUDYA AJA (as he then was) restated cause of action as follows at page 16 of Joel Silonda v Nkomo SC 6-22; -

> "The law on what constitutes a cause of action is settled. A cause of action is simply a factual conspectus, the existence of which entitles one person to obtain from the court a remedy against another person. In other words, it is an entire set

> of facts upon which the relief sought stands. See Peebles v Dairiboard (Private) Limited 1999 (1) ZLR 41 (H) at 54E-F and Abrahamse & Sons v SA Railways and Harbours 1933 CPD 626 at 637."

[26] In the main matter, Charter Properties had relied on clause 21.1 of the lease agreement in founding its claim for breach. This clause was quite clear in import. It declared non-payment of rent and failure to rectify same within 14 days as terminable breaches. Mr. Masango confirms that on 7 October 2022, POSB were served with a notice from the landlord. This letter cancelled the lease, demanded outstanding rentals as well as the vacation of premises.

[27] It is important to note that POSB does not unequivocally deny that it breached the lease agreement as alleged. Engagements did take place, but these did not elicit a revocation of the cancellation. The explanation that a reconciliation was necessary to establish the exact position on payments does not absolve it. Mr. Masango further stated that the reconciliation confirmed that POSB indeed were owing.

[28] POSB therefore made a payment of ZWL$ 8,685,970 on 21 October 2022.This payment reduced POSB`s indebtedness to ZWL$634,163,23. This explanation would have reduced the matter to simple accounting in the following syllogism; -

i. POSB admitted that it owed ZWL$ 8,685,970
ii. This was as at 21 October 2022
iii. POSB therefore settled this amount on that date
iv. It then owed an amount of ZWL$634,163,23
v. This was as at 21 October 2022
vi. Charter Properties however issued summons for ZWL$13,091,992,23
vii. This was as at 25 October 2022
viii. Charter Properties` claim was incorrect, part of that claim had been settled. Its suit was therefore defendable

[26] This last position would have carried weight had POSB been unequivocal about the matter. But finds that POSB adopts a different position in its draft plea. It seeks to argue that

it had *substantially* paid off the outstanding arrears-which is vague. In his founding affidavit Mr. Masango stated that POSB *reduced the arrears* to the ZWL$634,163,23. In the next breath (paragraph 8.10) he claims that the amounts claimed in the summons *had been cleared* on 21 October 2022.The draft plea further clouds matters by alleging *substantial compliance*.

[27] POSB also contends that subsequent to the 21 October 2022 payment, it dutifully adhered to the terms of the lease agreement-which would be untrue. The lease had been cancelled. Clearly, POSB`s position is untenable. It has no answer to the cancellation of the lease agreement. It had breached the lease agreement by accumulating arrears. This conclusion means that POSB has no argument regarding prospects of success against the allegations of breach and termination. Which allegations resulted in the order of cancellation and ejectment.

[28] Mr. *Chidembo* cited the decision of *Musasa Project v Bhala & Anor* HH 169-16. Counsel did so in furthering the wilful default argument rather than a fully-fledged defence of compromise. Indeed, whilst POSB seemed poised to raise the defence of compromise as a fresh causa, it neither proffered evidence of such nor pursued it to conclusion in argument. The engagements that occurred after summons were issued were as noted above, frantic on the part of POSB, but non-committal on the part of Charter Properties.

[29] I now advert, (for completeness), to the issue of mootness raised on behalf of Charter Properties. I am inclined to agree with Mr. *Chidembo* that as pointed out in *MDC & Ors v Mashavira & Ors* SC 56-20 [page 33] that; -

> "…. mootness does not constitute an absolute bar to the justiciability of the matter. The court retains its discretion to hear a moot case where it is in the interests of justice to do so."

[30] It becomes necessary therefore to conduct an investigation into the bar of mootness by testing the *causa* against the established principles. Herein, the matter was not fully ventilated from that perspective. And given that the inquiry into prospects of success effectively disposes of the issue, I find it unnecessary to venture further into mootness.

[31] I would however comment that any inquiry into mootness must also scope in the consideration that default judgments are not judgments on the merits as held in *Harare Sports Club and Another* v *United Bottlers Ltd* 2000(1) ZLR 264 (H). Further, recently, the Constitutional Court asserted the right of a litigant to contest a decision awarded against it despite having settled the writ issued subsequent to that judgement in *Zimbabwe Consolidated Diamond Company v Adelcraft Investments (Pvt) Ltd* CCZ 2-24. The point *in limine* is therefore overruled.

[32] I now address compositely, the items (iv) to (viii) as framed in *Read v Gardiner*. This matter demonstrates, once again, the importance of adhering to rules of court. The dispute appears to have been a good candidate for resolution under the case management aegis of the Commercial Court Rules. And without having to proceed to judgment too! And on that basis, the opportunity to resolve disputes speedily and amicably was lost. The need for finality to litigation carries a different sting when relating to commercial disputes.

[33] That need militates against the granting of condonation. Especially weighed against the dereliction noted above and greatly diminished prospects of success. I further take into account the fact that before the court is but a routine landlord and tenant dispute. And one too, whose fundamental controversy has been rendered tepid by performance and execution.

DISPOSITION

[34] In the premises, the applicant herein has been unable to fulfil the requirements justifying a reprieve by this court. Accordingly, it is hereby ordered; -

1. That the application for condonation for failure to file the application for rescission of judgment as prescribed by rule 15 (1) of the High Court (Commercial Division) Rules SI 323/20 be and is hereby dismissed with costs.

Kantor & Immerman-applicant`s legal practitioners
Chimuka Mafunga-respondent`s legal practitioners

[CHILIMBE J____28/2/24]

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