EMPORIUM REAL ESTATE AND
LAND DEVELOPMENT (PVT) LTD
And
EMPORIUM ESTATE DEVELOPMENTS
(PVT) LTD
And
DOLIGHT ENGINEERING (PVT) LTD
Versus

KEAVER INVESTMENTS (PVT) LTD

HIGH COURT OF ZIMBABWE
MUCHAWA J
HARARE,21 June & 29 October 2024

Opposed Matter

Mr *B K Mataruka*, for applicants
Mr *H K Muza*, for respondent

MUCHAWA J: This is a court application for rescission of judgment. The applicants seek to have the default judgment granted by MUSITHU J on 28 June 2023 under case number HC 2656/23 set aside. The order sought as set out in the draft order speaks to this as follows:

> "1. The judgment granted by this Honourable court under case No. Hc 2656/23 on 28 June 2023 be and is hereby rescinded.
> 2. The matter shall proceed in terms of the Rules of this court.
> 3. No order as to costs".

<u>The background facts</u>

The respondent and the second applicant entered into a joint development agreement on or about 28 January 2020 in respect of a piece of land belonging to the respondent situate at stand 239 Borrowdale Brooke Township Harare.

One of the terms of the agreement was that the second applicant should obtain all necessary approvals permits and licenses from the city of Harare pursuant to embarking on the development work in order to give the agreement force and effect.

It is the respondent's case that the suspensive condition was not met within the first six months and it gave the second applicant a further six month extension. It averred that despite such extension of time, within which to perform, the second applicant has failed, refused or neglected to fulfill the suspensive condition and this led to the respondent terminating the contract in writing on 14 November 2022. Furthermore the second applicant is alleged to have fraudulently misrepresented to the respondent that it had secured a subdivision permit yet the City of Harare refuted this in a letter dated 31 March 2023 and indicated penalties had been imposed on the respondent.

Additionally, the second applicant is accused of fraudulently entering into an agreement of sale with the third applicant in respect of the land in question without respondent's knowledge or consent. This is said to have led to the filing of the urgent chamber application under case number HC 2656/23 on 20 April 2023 to interdict second applicant from disposing of or interfering with respondent's property. The provisional order in that matter was granted by consent of the parties on 27th April 2023. The provisional order was then served on the applicants on 23 May 2023, and it directed them to file their opposing papers, if any, by 7 June 2023. This timeline was not met hence this application.

The applicants have an entirely different version of the facts. They claim not to have breached the agreement as alleged. They say they were involved in the developments on the land when they were dragged to court and had in fact completed 95 % of the works. They deny having interfered with the ownership of the land nor having purported to be respondent nor having disposed of all the respondent's land. It is alleged that one Patrick Nyanhanga, who was their appointed representative in this contract, is the one fomenting discord through peddling lies.

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

The requirements in an application for rescission of a default judgment were set out in the case of *Stockil* v *Griffithis* 1992 (1) ZLR 172 (SC). Therein, it was held as follows:

> "The factors which are taken into account in deciding whether a default judgment should be rescinded are:

(a) The reasonableness of the applicant's explanation for the default
(b) The *bona fides* of the application to rescind the judgment, and
(c) The *bona fides* of the defence on the merits of the case and whether the defence carries some prospects of success."

In *Songore* v *Olivine Industries* (Pvt) Ltd 1988 (2) ZLR 210 (SC) this had been stated thus: that a default judgment may be set aside for good and sufficient cause.

I turn to apply the law to the facts of this matter.

The reasonableness of the explanation for the default

The applicants submit that they were not in willful default. They state that after service of the provisional order on them on 23 May 2023, they filed their notice of opposition on 7 June 2023. The only problem is said to be the delay in serving the respondent leading to the filing of a chamber application for default judgment which was then never served upon them. As the notice of opposition was filed timeously, and is on record, it is argued that they have advanced a plausible explanation for the default.

It is further contended that even, for a moment, it was assumed, though not conceded, that the applicants were in willful default, the court may condone the non-adherence with the Rules on service on the basis of a strong case on service on the basis of a strong case on the merits as per *Arosume Property Development (Pvt) Ltd* v *Godfrey Madiro Fungurani* HH 805/18.

Mr *Mataruka* contended that a litigant's case cannot surely collapse simply because the legal practitioners did not carry out the function of service after the litigant had signed opposing papers. In this case the blame is sad to lie squarely at the feet of the applicant's erstwhile legal practitioners, Nyangani Law Chambers.

It was pointed out that it's not uncommon that filing is done and due to administrative errors, this is not brought before the judge because on record are the opposing papers duly stamped and signed by Registrar Masika.

The court's attention was also drawn to the fact that this was before the IECMS era and misfiling could have easily happened. On the other hand, Mr *Muza* submitted that the applicants were in willful default and have no reasonable explanation for the default as per *Zimbank* v *Masendeke* 1995 (2) ZLR 400 (5).

The court was referred to r 59(7) to (9) of the High Court Rules 2021 to argue that a party which fails to file its notice of opposition on time is automatically barred. The applicants are alleged to have had full knowledge of these provisions and the attendant consequences of

non – compliance. Resultantly it is averred that they were in willful default as the provisional order under HC 2656/23 was served on them on 23 May 2023 and they had 10 days in which file their notice of opposition. This should have been filed by 7 June 2023 and service on the respondent should had been affected by 9 June 2023.

It is questioned whether, in fact, the notice of opposition was indeed filed on 7 June 2023 casting aspersions on that claim. The point is made that, if indeed the notice of opposition was on record, the court will not have proceeded to grant the default judgment.

The fact that the applicants accept that, contrary to the requirement in the Rules to serve the other side within 48 hours, they only served the respondent 30 days later is said to be inconsistent and illogical. The applicants are said to have sat on their laurels and the court is urged not to accept their explanation for the default.

The court cannot turn a blind eye to the presence of the notice of opposition on p 188 of the consolidated record which was filed on 7 June 20-23 and endorsed by the signature of a registrar by the name of "R Musika." The same shows that it was then only served on 6 July 2023 at the respondent, then applicant's legal practitioners.

Should the court hold that the applicants were in willful default in the circumstances of this matter?

The admitted failure to serve timeously is imputed on the legal practitioners. Should such conduct be visited on the applicants?

The case of *Zimbabwe Banking Corp* v *Masendeke* 1995 (2) ZLR 400 (5) is instructive. It states:

> "Willful default occurs when a party with full knowledge of the service or set down of the matter, and of the risks attendant upon default freely takes a decision to refrain from appearing. Here there was a mistake. It was clearly a mistake………
>
> The mistake was like many mistakes where documents go astray in the filing system of an organization, inexplicable…………………….
>
> So, the explanation that the summons was filed in error is an explanation. The learned judge was wrong to say there was no explanation. How it happened may be inexplicable but that it happened is undeniable.
>
> The willfulness of a default is seldom, if ever, clear cut. There is almost an element of negligence, and the question arises whether it was gross negligence and whether it was so gross as to amount to willfulness. And in coming to a conclusion there is a certain weighing of the balance between the extent of the negligence and the merits of the defence."

In casu, because the applicants timeously filed a notice of opposition, it cannot be said they, with full knowledge of the consequences refrained from acting. Admitted, they did not serve the notice of opposition on the respondent. That negligence cannot be conclusively said to amount to willful default.

The possible misfiling of the notice of opposition is akin to the mistake in *Zimbabwe Banking Corp* v *Masendeke supra* which happen in man institutions especially if regard is had to the fact that this was before the IECMS introduction.

Additionally, the negligence by applicants legal practitioners in failing to serve timeously, though contrary to the Rules, cannot be taken to be so gross as to amount to willfulness.

It is my finding that the applicants have advanced a reasonable explanation for the default.

Whether there are prospects of success on the merits and the *bona fides* of the defence and application for rescission

The applicants submit that they have a *bona fide* defence to the respondent's claim. They insist that they did not breach the agreement as alleged and that developments were ongoing when the legal battles started. They claim to have completed 95% of the work.

It is denied that the applicants interfered with the ownership of the land nor disposed all of the respondent's land as alleged. They further refute that they ever purported to be the respondent. They point to one Patrick Nyanhanga as fomenting lies to cause discord and personally benefit. The applicants claim to have a bona fide defence in the main claim under HC 2656/23.

Furthermore, it is argued that the remedy of cancellation sought by the respondent is a discretionary remedy usually granted where there has been a fundamental breach of the contract. The applicants contend that since about 95% of the work had been completed, there can be no fundamental breach justifying cancellation and the court can consider other appropriate alternative remedies.

It is prayed that the order of rescission of judgment be granted therefore.

Per *contra*, the respondent argues that there is no *bona fide* defence on the merits as the applicants failed to fulfill a suspensive condition leading to the agreement being of no force and effect.

In casu the applicants are said to have failed to obtain all the necessary regulatory approvals, permits and licences from the City of Harare. A letter from the City of Harare confirming the non -existence of same of 31 March 2023 is referred to despite giving the applicants a full year from 28 January 2020 to 28 January 2021.

In the circumstances, the respondent avers that it lawfully cancelled the agreement and this became effective from the date of communication of the cancellation. On the other hand,

the applicants claim that the agreement was never cancelled were allegedly sent on 14 November 2022 and 31 May 2023. Cancellation letters were sent through to Mr Nyanhanga, who was the applicants' designated representative, in terms of the agreement. The applicants' distancing of themselves from their designated representative is alleged to be improper as this was never communicated and is considered a ploy to wriggle themselves from a clear case against them.

The respondent raises the further point that the first and third respondent who are not parties to the agreement have no *locus standi* to sue due to the doctrine of privity of contract.

Further, it is averred that the current application is not bona but has been filed to buy time and delay the respondent from fully and freely exercising its rights of ownership over its property.

It is contended that if the applicants had intended to go to the merits of the matter, then they would not have been in default therefore they have no prospects of success on the merits.

The fact that at the time of the granting of the default judgment in HC 2656/23 the applicants were already barred in terms of Rule 59(9) is pointed to as putting a dent in applicant's prospects of success. It is stated that the applicants cannot succeed in uplifting the bar in case HC 2656/23 and the court should not indulge them and clog the justice delivery system. It is prayed that the application should be dismissed.

In reply, the applicants point to irregularities in the alleged cancellation of the agreement and state that cancellation is a singular act and the fact that the contract was cancelled twice is telling.

The question about the upliftment of the bar in HC 265/23 is said to be one which falls for determination in the main matter and not before me.

What I have to determine is really whether the applicants have an arguable case.

They claim to have carried out certain works in execution of the agreement, spent lots of money and they view the cancellation as improper and seek an opportunity to argue the matter.

While it inappropriate to dwell on the merits as if I am dealing with the main matter, I dare say that it is obvious that there are *prima facie* grounds for saying there may be merit in the defence. The parties should have their day in court to lash the following issues which any out of determination and final resolution:

(i) whether the applicants fulfilled the suspensive condition

(ii) whether the agreement came into effect

(iii) whether the applicants carried out any works and if so, the extent of such works.

(iv) Whether the agreement was property cancelled.

(v) Appropriate remedy in the circumstances.

The question of the upliftment of the bar does not fall for determination before me. It would be for the main matter. The citation of the first and third applicants is in line with the parties in HC 2656/23 whose judgment is sought to be rescinded. They are properly before me.

This is a case where an order that each party bears its own costs would be fitting because this matter arose because of negligence on the part of the applicants' counsel. An order that the application succeeds with costs would be unfair on the respondent which was exercising its right to defend this matter.

Consequently, I order as follows:

1. The judgment granted by this Honourable Court under case No. HC 2656/23 on 28 June 2023, be and is hereby rescinded.
2. The matter shall proceed in terms of the Rules of this court.
3. Each party bears its own costs.

Manokore Attorneys, applicants' legal practitioners
Nyangani Law Chambers, respondent's legal practitioners