RAMBO 2 MINING SYNDICATE
and
COURAGE MUDZENGE
and
WILFRED MBOMA
versus
ERIC WILLIAM BEACHY-HEAD
and
THE SECRETARY FOR MINES AND MINING DEVELOPMENT
and
OFFICER IN CHARGE, MARLBROUGH POLICE STATION N.O.

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE; 19 March & 5 May 2025

Opposed Application-Rescission of default judgment

Mr *A Mugiya,* for the applicants
Mr *D Ochieng,* for the 1st respondent

MUSITHU J: Before the court is an application for rescission of a default judgment granted by this court in HCH 1748/24 on 19 June 2024. The application was made in terms of r 27(1) of the High Court rules, 2021. The first applicant's founding affidavit was deposed to by the third applicant in his capacity as the authorised representative of the first applicant. The application was opposed by the first respondent. A notice of filing was issued and filed on behalf of the second and third respondents by the Civil Division of the Attorney General's office. They indicated that they were not opposed to the relief sought by the applicants.

The factual background to the application is as follows. Sometime in June 2024, the first respondent filed an urgent chamber application seeking the cancellation of a special grant No. 8704 (the special grant) granted in favour of the first applicant. The application was served on the first applicant and it in turn filed its notice of opposition on 19 June 2024. The deponent claimed that despite being served with the opposition, the first respondent proceeded to set the matter down for hearing and did not serve the physical notice of set down on the first applicant. As a result, the applicants failed to attend the hearing resulting in default judgment being granted against them.

The first applicant became aware of the default judgment on 5 August 2024 when it received a letter from the second respondent advising it that the special grant which had been granted in its favour would be cancelled pursuant to the default judgment.

The applicants averred that for them to succeed in an application of this nature they were required to demonstrate good and sufficient cause for the setting aside of the default judgment. In doing so, they were required to further demonstrate the reasonableness of their explanation for the default, the *bona fides* of the application to rescind the judgment and the *bona fides* of the defence on the merits of the case which carries some prospect of success. The applicants contended that they had provided a reasonable explanation for the default because after filing their notice of opposition, they were not informed of the set down of the matter.

As regards prospects of success, it was averred that the first applicant had legal rights to the land in question. The first applicant was issued with special grant for gold mining in respect of the land in question on 14 August 2023 by the second respondent after due procedure which had commenced since October 2020. The applicants' presence on the land in question was therefore in accordance with the law.

The applicants averred that the first respondent did not hold a valid offer letter over the land in question, since the Deed of Transfer 5957/80 which he held lapsed by operation of law when the Government of Zimbabwe compulsorily acquired the land under the land reform in terms of the Government Gazette of 24 February 2006. The land did not fall under the jurisdiction of the Ministry of Mines and Mining Development, but under the National Museums and Monuments in terms of s 21 of the National Museums and Monuments Act [*Chapter 25:11*]. As a relevant government department, the National Museums and Monuments was never made part of the proceedings despite being an interested party by virtue of its ownership of the land.

Further, the first applicant had a genuine intention to defend the main matter, which was evinced by the filing of the notice of opposition.

Attached to the founding affidavit was the supporting affidavit of Oscar Gasva, the applicants' erstwhile legal practitioner who represented the applicants in HCH 1748/24. In para 2 of his affidavit Gasva stated that the notice of opposition was filed out of time and it was served on the first respondent. Despite being served with the notice of opposition, the first respondent treated the matter as opposed because the notice of opposition was never struck off from the record. The first respondent proceeded to have the matter set down on the unopposed roll and did not serve the legal practitioner or the applicants with a notice of set down. The

default was therefore not wilful as it was caused by pressure of work on his part for which he apologised.

The second and third applicants associated themselves with the averments made in the first applicant's founding affidavit.

The First Respondent's Case

The first respondent challenged the status of the first applicant as a juristic person. He also averred that the applicants had not disclosed any basis for the rescission of the judgment. The applicants were in wilful default and the current application was also filed out of time. The first respondent averred that the application in the main matter was filed in early April 2024, and each of the applicants had been served with the application.

According to the first respondent, the applicants did not oppose the application in the main matter. They consented to the granting of the provisional order which restrained the acts of violent intrusion that were being committed in their names. The provisional order was granted on 26 April 2024. Even though it was granted by consent, the first respondent's legal practitioners served the order on the applicants' legal practitioners. This was so because the applicants were committing acts in violation of the order. Such service was made under cover of a letter dated 3 May 2024.

The applicants' legal practitioners responded to the letter claiming that the persons who were continuing to commit the violations that necessitated the court's order were unconnected to the applicants. The applicants were obliged to file their opposition to the confirmation of the provisional order no later than 17 May 2024, but they did not do so. The matter therefore stood to be dealt with as unopposed.

On 27 May 2024, the applicants sought the first respondent's consent to file their opposition to the confirmation of the provisional order out of time. They claimed that they had deliberately delayed filing the opposition in order to allow the second respondent to complete its internal processes in regard to a mining special grant that the applicant claimed as a pretext for their wrongful intrusion. The first respondent did not consider their request to be sincere and withheld his consent. He insisted that they should make an appropriate application.

According to the first respondent, his legal practitioners were able to secure the set down of the unopposed for the confirmation of the provisional order for 19 June 2024. As at that date, and as at the date the first respondent deposed to the opposing affidavit, the applicants had not made the application that was required of them from as far back as 27 May 2024. The provisional order which the applicants had consented to was confirmed in the morning of 19

June 2024. It was only in the afternoon of that same day that the purported notice of opposition to the confirmation of the consent order was uploaded into the Intergrated Electronic Case Management System (IECMS).

The first respondent further averred that the applicants' founding affidavit contained falsehoods and omissions concerning: the date on which the first respondent filed his application in the main matter; the applicants' express consent to the provisional order; the reason for which the applicants did not file their opposition timeously to the confirmation of the provisional order; the bar against the applicants in regard to opposing the confirmation of the provisional order and the applicants' knowledge of the bar and the ineffectiveness of their purported opposition filed after the order had been granted.

The first respondent also asserted that the position known to the applicants was that the confirmation stood to be dealt with as unopposed. The applicants would have been notified of the set down date via the IECMS, just as the first respondent was notified. The default order was therefore granted in the normal course. The applicants did not abide by the rules except with regard to their consent to the provisional order. No explanation was given for the default and their account actually confirmed the wilfulness of their default. The current application was filed some two and half months after the date on which the applicants became aware of the confirmation of the consent order.

The first respondent also contended that the applicants had not demonstrated the basis on which they could have resisted the confirmation of the provisional order which they had consented to. The Supreme Court had already held that the land in question was not open to prospecting under the law. The special grant was accordingly invalid. The second respondent had accepted this to be the position.

The property in question was private land that was within the precincts of an urban township. The reference to the offer letters was thus mystifying. The property in question was the remainder of Blue Hills of Christon Bank measuring 233, 0274 hectares held under Deed of Transfer 5947/80. There was no mention of the property in the Government Gazette of 24 February 2006, as averred by the applicants. The property was never lawfully acquired and the first respondent retained title to it. Further, the property was never acquired by the National Museum and National Monuments or anyone else. All the parties with an interest in the matter were cited in the main matter, and did not resist the grant of the provisional order or its confirmation.

The application is an abuse of court process predicated on deliberate falsehoods and for that reason it ought to be dismissed with costs on the legal practitioner and client scale.

The Answering Affidavit

In the answering affidavit, the first applicant insisted that a mining syndicate was a juristic person in terms of r 11(1)(b) of the rules. It had the capacity to sue and be sued. The applicants also insisted that the urgent chamber application was filed in June 2024 and not on 3 May 2024 as claimed by the first respondent. The applicants also insisted that they opposed the main matter in HCH 1748/24, as evidenced by the notice of opposition filed of record. The applicants did not deny that the provisional order was served on them. Their only contention was that the first respondent neglected to serve them with the notice of set down. The applicants insisted that the first respondent was obliged to serve them with a physical copy of the notice of set down, despite the fact that the registrar would have notified the parties via IECMS.

The applicants maintained their position that the first respondent did not hold any title to the land. The Deed of Transfer 5957/80 had lapsed by operation of law when the land was compulsorily acquired.

The Submissions

Mr *Mugiya* for the applicants submitted that the applicants' default was not wilful. He claimed that the applicants only became aware of the default judgment upon receiving the second respondent's letter of 2 August 2022. That letter informed them that the special grant had to be cancelled because of the order granted by the court in their default. The applicants then filed the present application pursuant to that letter. Mr *Mugiya* further submitted that the default judgment was granted due to the negligence of the applicants' erstwhile legal practitioners. The said legal practitioners had assured the applicants that the notice of opposition had been filed.

According to Mr *Mugiya*, the issue was whether the applicants should be punished for the sins of their legal practitioners. The legal practitioners had since owned up for their omission. In view of the way the applicants acted after becoming aware of the default, then the court should not punish them. According to the applicant, the issue was answered in the cases of *Chindori-Chininga v Bally Carney (1991) (Private) Limited* SC 91/04; *FBC Bank* v *Chiwanza* SC 31/17 and *Talbert* v *Yeoman Products* (Pvt) Ltd SC 111/99. The theme that cuts across the cases was that litigants should not be blamed for the omissions of their legal

practitioners especially where the omissions were concerned with non-observance of rules of court.

In response, Mr *Ochieng* for the respondent submitted that the difficulty with the applicants' case was that what was being submitted by their counsel was at variance with their founding affidavit. There was an acceptance that the chronology of events given by the first respondent and that given by the applicants was wrong. The application had to be determined on the basis of the founding affidavit. In the answering affidavit, the applicants defiantly persisted with their falsehoods.

Mr *Ochieng* further submitted that even on the merits, the applicants' case was incomprehensible. The applicants professed to have mining rights in the precincts of an urban set up. The Supreme Court had determined that that could not be done. This court could not depart from what the Supreme Court had determined. In any event, the applicants had consented to an interim order and thereafter refrained from it. The application was an insincere attempt to run away from the inevitable.

Analysis

Rule 27(2) provides that a judgment granted in default maybe set aside if the court is satisfied that there is good and sufficient cause to do so. In determining whether there is good and sufficient cause to set aside the default judgment, the court must consider the reasonableness of the applicant's explanation for the default, the *bona fides* of the application to rescind the judgment and the *bona fides* of the defence on the merits of the case which carries some prospects of success.

In *casu*, the reasonableness of the applicants' explanation must be considered in the context of the totality of the circumstances of the case, and the manner in which the applicants conducted themselves. As observed in the cases cited above by the applicant's counsel, the theme that emerges from the Supreme Court authorities is that the courts are ordinarily chary about visiting the sins of the legal practitioners on their hapless clients especially where matters of court procedure are concerned. That is not to suggest that on their part, litigants should not be candid with the court and depose to falsehoods. The courts will not be sympathetic with litigants that conveniently withhold information or present a false account of events all in the vain attempt to portray themselves in good light.

In their founding affidavit, the applicants did not bother to mention that the default judgment they wanted rescinded was the product of a provisional order that was granted with their consent by TSANGA J on 26 April 2024. They only attached the default order which was

granted by MUNANGATI-MANONGWA J on 19 June 2024. The applicants did not disclose that the provisional order was served on their former legal practitioners, Mbano Gasva & Partners on 3 May 2024, through a letter from the first respondent's legal practitioners of the same date.

The letter of 3 May 2024 from the first respondent's legal practitioners accused the applicants of violating the terms of the provisional order by continuing with illegal mining operations on the disputed property. The applicants' erstwhile legal practitioners responded to the letter of 3 May 2024, by way of a letter dated 6 May 2024, in which they denied that they were in breach of the provisional order. It was also stated in the same letter that the applicants had stopped all mining operations in the disputed area. The same letter confirmed that the provisional order had been served on 3 May 2024.

In para 9 of their founding affidavit, the applicants claimed that the urgent chamber application was filed in June 2024. No mention was made of the provisional order. Despite the correction by the first respondent in his opposing that the urgent chamber application was actually filed in early April 2024, the applicants insisted in para 4 of their answering affidavit that the said application was filed in June 2024. The applicants' impudence is strange. This is because the first respondent attached to his opposing affidavit a copy of the provisional order which showed that it was granted and issued by TSANGA J on 26 April 2024.

Also attached to the first respondent's opposing affidavit were the aforementioned letters of 3 May 2024 and 6 May 2024, which had been exchanged between the parties' legal practitioners. The letter of 3 May 2024 was accompanied by a copy of the provisional order, while the letter of 6 May 2024 acknowledged the service of the provisional order. It therefore boggles the mind how the applicants continued to insist that the urgent chamber application was filed in June 2024 in the face of all the documentary evidence.

In their founding affidavit, the applicants claimed that after they were served with the application which they claimed was filed in June 2024, they filed their notice of opposition on 19 June 2024. Again, nothing was said about the provisional order that had already been served on them. The impression created therefore is that the notice of opposition was in response to some fresh application that had been filed in June 2024, yet there was some extant provisional order whose confirmation the applicants were required to oppose if they were so minded.

In their founding affidavit, the applicants also want to create an impression that their notice of opposition in HCH 1748/24 was filed timeously on 19 June 2024. The notice of opposition was allegedly served on the first respondent's legal practitioners who proceeded to

set the matter down for hearing and did not serve the notice of set down on the applicants. No certificate of service was attached to confirm the alleged service of the opposition on the first respondent's legal practitioners. The applicants conveniently refrained from mentioning that at the time they filed the notice of opposition on 19 June 2024, they were already out of time and were barred.

In his supporting affidavit, the applicants' former legal practitioner Oscar Gasva accepted responsibility for the default which he attributed to pressure of work. He did not expressly admit that the notice of opposition was filed out of time. Instead, Gasva accused the first respondent's legal practitioners of not serving him with the notice of set down resulting in him not attending court on the day the default judgment was granted. Yet on 27 May 2024, the same legal practitioner had written to the first respondent's legal practitioners seeking their indulgence to file the notice of opposition out of time. Part of the letter reads *"We kindly seek your indulgence to file our notice of opposition to the granting of the final relief sought in this matter".* This letter was not attached to the applicants' founding affidavit. It was attached to the first respondent's opposing affidavit.

The applicants and their erstwhile legal practitioner conveniently avoided mentioning their letter of 27 May 2024 or acknowledge that the notice of opposition filed in HCH 1748/24 had been filed out of time. Yet they were obviously aware of this position but chose to abstain from giving a correct account of the events. In the absence of a condonation for the late filing of their opposition in HCH 1748/24, the applicants could not expect to be heard on 19 June 2024 when the default judgment was granted.

It is also worth noting that the notice of opposition was issued and filed on the same day the default judgment was granted. The first respondent's legal practitioners averred that the notice of opposition was only uploaded in the IECMS in the afternoon of that day, well after the court had granted the default judgment. In the absence of proof confirming that the notice of opposition was issued and filed earlier in the morning before the court granted the default judgment, the court is persuaded to accept that the first respondent's account that at the time the default judgment was granted, there was no notice of opposition before the court. The court could not have been expected to have due regard to that opposition, and consider striking it off from the record when it was not there in the first place.

In the final analysis, the court is satisfied that the applicants' explanation for the default is hopelessly unreasonable. The applicants' accounts of events, as set out in the founding affidavit, is replete with falsehoods and material non-disclosures. In short, their case is wholly

unreliable. In *Matsika & Anor v Chingwena & 38 Ors*[1], the court made the following pertinent remarks on litigants who depose to falsehoods:

> "In light of his deceitful character the learned judge *a quo* cannot be faulted for holding that the 1st respondent's cause was founded on lies and fraudulent documents. That finding is amply supported by the evidence on record. For that reason, the learned judge *a quo's* reliance on the dictum of NDOU J in *Leader Tread Zimbabwe (Pvt) Ltd* v *Smith*[2] is apt. In that case the learned judge observed that:
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> > "It is trite that if a litigant has given false evidence his story will be discarded and the same adverse inference may be drawn as if he has not given evidence at all.- see *Tumahole Bereng v R [1949] AC 253 nd South African Law of Evidence* IH Hoffman and DT Zeffert{3rd ed) at page 472, if he lies about a particular incident, the court may infer that there is something about it which he wishes to hide."'

Litigants who seek to mislead the courts by withholding critical information or deposing to falsehoods must not expect sympathy from the court. The business of the courts must be taken seriously. The alleged default must not entirely be apportioned on the applicants' erstwhile legal practitioners. The conduct of the applicants of withholding critical information to the court, which information was clearly at their disposal, and in the process seeking to the mislead the court is highly exceptionable.

It was submitted on behalf of the first respondent that even on the merits, the applicants' case was hopeless as there were no prospects of success. It was submitted that the land in dispute was private property, it being located in the precincts of an urban township. It was never acquired by Government. The applicants sought to refute this assertion by referring to a copy of the Government Gazette of 24 February 2006. There is however no mention of the property in the said extract of the Government Gazette attached to the applicants' founding affidavit. Nothing was also placed before the court to show that the property was owned by the National Museums and Monuments.

The court determines that the applicants have failed to demonstrate the basis on which they could have successfully challenged the confirmation of the provisional order which yielded the judgment that they want rescinded. They failed to demonstrate that they had any rights in the disputed property, and that the setting aside of their deed of grant was improper.

Costs

The court was urged to dismiss the application with costs on the legal practitioner and client scale. The first respondent's request is not off the mark. The conduct of the applicants

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[1] SC 144/21 at p 10
[2] HH – 131 - 03

clearly justifies a dismissal of their application with costs on the legal practitioner and client scale, for reasons set out in the judgment.

Resultantly it is ordered that:

1. The application is hereby dismissed.
2. The applicants shall bear the first respondent's costs of suit on the legal practitioner and client scale.

MUSITHU J:……

Mugiya Law Chambers, legal practitioners for the applicants
AB & David, legal practitioners for the first respondent