DAILY DOSE INVESTMENTS (PVT) LTD

Versus

PRITCHARDS TRADING (PVT) LTD

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
CHILIMBE J
HARARE 19 May and 17 June 2025

Opposed application

U. Nare for applicant
T. Chimusaru for respondent

CHILIMBE J

BACKGROUND

[1] The applicant seeks the setting aside of an order granted under case number HCHC 499/22 in default of its appearance at a case management conference on 18 May 2023. In the main dispute, the herein respondent had claimed an amount of US$45,000 as monies due and payable for a 40,000 litres consignment of diesel delivered, together with US$10,000 (presumably) as damages for breach of contract.

[2] The respondent resisted the claim and matter was progressed to pre-trial case management. The order was granted in terms of r 21 (2) of the High Court (Commercial Division) Rules SI 202 of 2021 ("the Commercial Court Rules"). This rule provides that; -

> 21 Failure to appear of one or more parties
> (1) Where at the time appointed for the pre-trial case management conference, one or more of the parties or witnesses, fails to attend, the judge may—
> (a) dismiss the suit or proceedings;
> (b) strike out the defence or counterclaim;

(c) enter judgment;

(*d*) make such other order as he or she considers fit on the papers filed of record.

(2) An order made by the judge in terms of this rule may be set aside on the application of the party affected thereby on good and sufficient cause shown within ten days from date of the order, and on such terms as the judge considers fit and just and the provisions of Rule 15 shall apply to the extent possible.

[3] An application of this nature is made in terms of, and must satisfy the requirements of r 15 of the Commercial Court Rules. Rule 15 (2) by (b) and (c) in essence, and read *mutatis mutandis*, obliges the applicant to do two things. Firstly, tender good and sufficient reason for its breach and secondly, demonstrate good prospects of success on the merits.

[4] In that respect, the applicant is required to meet the age-old standard of showing good sufficient cause. The parties correctly directed the court to the authorities which set out this established principle which include; - *Zimbabwe Banking Corporation v Masendeke* 1995(2) ZLR 400 as well as *Deweras Farm (Pvt) Ltd & Ors v Zimbank* 1998 (1) ZLR 368 (S).

GOOD AND SUFFICIENT CAUSE

[5] The applicant denied that it had wilfully derelicted attending the pre-trial case management set down for 18 May 2022. The explanation was that the notification of this commitment was delivered to the applicants` legal practitioner`s email spam folder. As such, they missed the alert and subsequently the case management conference. A supporting affidavit deposed to by Mr *U-Ukumetsi Matshaka Nare* of Maseko Law Chambers, the applicant`s legal practitioners of record and appearing counsel, confirmed this mishap.

[6] Mr *Nare* for the applicant, urged the court to treat the breach as a pardonable inadvertence which did not amount to gross will derelict. Neither on his part nor that of his client. Counsel further drew attention to the diligence with which applicant had prosecuted its defence up to the point. The failure to attend the case management conference was clearly out of character, he further submitted.

[7] Mr *Chimusaru* the respondent, took a different view. He dismissed the explanation tendered by applicant for its failure to meet the pre-trial case management conference. Counsel took the trouble to walk through the features and facilities in the IECMS system in a bid to expose applicant`s explanation as insincere. The system, counsel submitted, offered several notification options apart from the email platform. These included system notifications as well as portal alerts which informed parties of any filing or updates on the case portal.

[8] Any reasonably diligent legal practitioner who invested time to periodically check on case progress, as they ought to, would not miss alerts such as the notification under discussion. In any event, r 10 (3) of the Commercial Court Rules required a defendant to furnish not one but 2 email addresses. The purpose being to mitigate the very risk which befell the applicant.

WERE THE LEGAL PRACTIONERS IN DERELICT?

[9] There are 2 issues to consider in disposing of this point. Firstly were the applicant`s legal practitioners in derelict of duty? Secondly if so, the extent thereof and thirdly, whether the said proverbial legal practitioners` sins could be visited on the applicant. SANDURA JA dwelt on this aspect at length in *Beitbridge Rural District Council v Russell Construction Co* 1998 (2) ZLR 190(S). Citing with approval, the remarks of DUMBUTSHENA CJ, the Learned Judge of Appeal held as follows at 193A-B; -

> "In *S v McNab* 1986 (2) ZLR 280 (S), Dumbutshena CJ considered whether a party should be punished for the negligence of his legal practitioner and had this to say at 284A-E: In my view, clients should in such cases suffer for the negligence of their legal practitioners. I share the view expressed by Steyn CJ in *Saloojee & Anor NNO v Minister of Community Development* supra at 141C-E when he said: "There is a limit beyond which a litigant cannot escape the result of his attorney 's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise, might have a disastrous effect upon the observance of the rules of this court."

[10] The observations by Mr. *Chimusaru* relate to the standard to apply in reviewing explanations such as the one tendered to explain the applicant`s default. I am fully persuaded by counsel`s argument that the IECMS system has delivered several conveniences which ought to eliminate the inadvertences which bedevilled case management in the past. It would thus be a travesty if the courts and litigants remained stuck in the adversities of yesteryear in the face of a handy facility to overcome such. (See *Zimbank v Masendeke* (supra)).

[11] In that respect, explanations and standards which may have found favour or clemency from the courts in the past may very well not avail the present-day defaulter given the new functionalities available on the IECMS platform. In this regard, the explanation for failure to attend the pre-trial case management conference is unsustainable. The courts however tend to look at the extent and

seriousness of the failing concerned. In *Friendship v Dick* HH 128-13, ZHOU J was confronted with the following situation and observed thus at page 3; -

> "This is a case in which the applicant flagrantly disregarded the requirements of the rules. In such a case, particularly where there is no reasonable and acceptable explanation the indulgence of the court may be refused whatever the merits of the applicant's case may be, even if the blame lies solely on the attorney as is alleged by the applicant. *Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt0 Ltd supra at 254D; Tshivhase Royal Council & Anor v Tshivhase & Anor, Tshivhase & Anor v Tshivhase & Anor 1992 (4) SA 852(A) at 859E-F*."

[12] Based on the guidance in the aforegoing authorities, I recognise that the derelict on the part of the legal practitioners though deplorable was neither sustained nor extreme. Steps were immediately taken to address the infraction. An affidavit was filed to explain the default and I am inclined to accept the explanation, without discarding the criticisms directed at applicant`s legal practitioners by Mr. *Chimusaru*. I have further taken into account as redeeming, the diligence demonstrated by applicant in sustaining its defence up to the case management stage. I thus do not find applicant to have been in wilful default.

PROSPECTS OF SUCCESS ON THE MERITS

[13] On a date or period not stated, the parties concluded a verbal contract for the supply of bulk fuel. It is common cause that the terms of payment were "cash on delivery". It is also common cause that based on such terms, respondent delivered a consignment of 40,000 litres of fuel to applicant. Respondent claimed that applicant breached the parties` agreement by failing to pay for the fuel upon delivery and instituted proceedings to recover the value due as indicated above.

[14] The applicant`s argument then, and in this application, was that the respondent received payment. It was inconceivable, insists the applicant, that respondent, strict as it was on cash upon delivery, would decant fuel at applicant`s site before payment was made. The issue of whether payment was made or not descended into a quarrel in the papers before me. The respondent protested that in practice, its employees could not demand payment before the fuel was offloaded. The process entailed confirming the quantity decanted as well as testing the fuel concerned for contamination.

[15] Either party could have made matters a great deal clearer by securing affidavits from the persons who participated in the delivery or alleged payment of cash at the site or as they say; -on

the ground. The supplier did not file an account from the driver or delivery crew to explain what exactly transpired. Similarly, the applicant could have shared the account by the employee or officials who counted monies to the respondent`s delivery crew.

[16] An amount of US$40, 000 is indeed a large of money by any standards to exchange in cash. That observation brings in the question of onus and standard of proof. In the recent decision of *Garizio & 2 Ors v Motsi & Anor* HH 89-25, I made the following comments on the point; -

> *"[26]* It is clear that the court`s discretion is wide and the matters to be covered equally diverse. These factors are considered one against the other and then cumulatively. The onus falls upon the applicant to demonstrate good and sufficient case. See *Makoni v CBZ* SC 47-20 and *V Saitis & Co (Pvt) Ltd v Fenlake (Pvt) Ltd (supra)* on the applicable test. The court does not adopt a trial court`s approach but must remain guided by the question; - do the totality of the circumstances warrant a grant of the relief sought?"

[17] The crux of applicant`s case payment for the fuel consignment in question was settled in full upon delivery. This is the main issue that should receive attention rather than the second argument from applicant raising issue over the discrepancy between 40,000 and 39,837 litres of fuel. The difference, as stated by respondent is not significant. The issue anchors on the payment which applicant avers it made. The simplest that applicant could have done, as noted above, would have been to detail how the payment was done.

[18] Applicant reiterated that it could not produce a receipt for the payment since the transaction was on a cash on delivery basis. This explanation sounds improbable. But if indeed it is the truth of what happened, then the circumstances in which the parties transacted generate alarm. A regulated product like petroleum, procured as a precious import critical to the day-to-day need of the needs, and transported as a hazardous material in specialised tankers could ought to not yield the sort of dispute over payment as that before us now.

[19] Mr. *Nare* did submit with some force that the gaps and shortcomings generated firstly by the parties` verbal contract and secondly, by the need for *viva voce* evidence warranted remitting the matter to fuller ventilation via a trial. Two comments address this submission. Firstly, the deficiencies related to by counsel tainted both parties and unfortunately, the applicant more than the respondent. The applicant cannot rely on the uncertainties of murky contractual terms as the basis for good prospects of success on the merits in a matter involving a contractual dispute of the nature between the parties.

[20] Secondly, again, the matter reverts to the manner in which applicant pleaded its case. As observed, applicant, ahead of respondent could have furnished cogent supporting statements to demonstrate proof of payment. I find myself repeating the remarks of the court in *Songore* v *Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (S) to the effect at 215 that; -

> "I must say in conclusion that it is perhaps fortunate for the plaintiff that I have found that the defendant has failed to discharge the onus. The plaintiff's affidavit is almost as inadequate as the defendant's. It fails to deal squarely with the allegation that payments were made by cheques drawn by Ruvangu Enterprises (Pvt) Ltd. It fails also to deal squarely with the allegation that the plaintiff was told in 1983 that Ruvangu Enterprises (Pvt) Ltd had taken over from the defendant. It speaks vaguely and misleadingly about "the corporate veil" and about the defendant's perjurious allegations, when these allegations were prima facie mistaken rather than perjurious."

DISPOSITION

[20] I am unpersuaded that the applicant enjoys prospects of success on the merits. Throughout the herein papers and argument, the applicant fastidiously avoided stipulating as a positive fact, the amount of money paid in exchange of the 40,000 litres of fuel received. This recalcitrance is inconsistent with the bona fides required in an application of this nature.

[21] Weighing the requisite factors, I am of the view that no good and sufficient cause to revisit the default judgment entered by this court on 18 May 2023 has been demonstrated.

It is accordingly ordered as follows; -

1 The application for rescission of judgment be and is hereby dismissed with costs.

Maseko Law Chambers – applicant`s legal practitioners
Dube-Tachiona and Tsvangirai -respondent`s legal practitioners

[CHILIMBE J____17/6/25]