MUDHAWIN ENTERPRISES (PVT) LTD

Versus

ENERGY PARK (PVT) LTD

HIGH COURT OF ZIMBABWE
COMMERCIAL DIVISION
CHILIMBE J
HARARE 15 May & 17 June 2025

Opposed application

R.T. Mutero for applicant
S. *Muzondiwa* for respondent

CHILIMBE J

INTRODUCTION

[1] Applicant prays for an order setting aside the default judgment granted by this court on 1 December 2023 in case number HCHC 244/23.Judgment was entered in the following terms; -

> 1. The defendant's appearance to defend, plea and counter-claim are hereby struck off.
>
> 2. Subject to Para 3 below, a default judgment is hereby granted in favour of the plaintif f in terms of the summons as amended and in the following terms:
>
> 2.1 the defendant shall pay the plaintiff the sum of US$67,914-00 [sixty-seven thousand, nine hundred and fourteen United States dollars] together with interest thereon at the rate of 5% per annum from the date of this order to the date of payment.
>
> 3. Notwithstanding the grant of this default judgment the plaintiff shall not be entitled to any costs of suit.

[2] The judgment was granted in default of present applicant`s attendance at a pre-trial case management conference in terms of rule 21 (2) of the High Court (Commercial Division) Rules SI 202 of 2020 ("the Commercial Court Rules"). This rule prescribes 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; 8

(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] The above rule directs a party against whom judgment is so entered to r 15 (2) (b) and (c) if such party intends to have the default set aside. Rule 15 (2) (b) does no more that stipulate the age-old requirement that a party seeking the setting aside of a judgment must proffer a good and sufficient reason for its default and demonstrate good prospects of success on the merits.

[4] This standard has been well-enunciated in numerous authorities[1]. The timeless passage in *Stockil v Griffiths* 1992 (1) ZLR 172 (S), GUBBAY JA (as he then was) at 173 is apt; -

> "The factors which a court will take into account in determining whether an applicant for rescission has discharged the onus of proving "good and sufficient cause", as required to be shown by Rule 63 of the High Court of Zimbabwe Rules 1971, are well established. They have been discussed and applied in many decided cases in this country. See for instance, *Barclays Bank of Zimbabwe Ltd* v *CC International (Pvt) Ltd* S-16-86 (not reported); *Roland E & Anor v McDonnell* 1986 (2) ZLR 216 (S) at 226EH; *Songore* v *Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (S) at 211C-F. They are: (i) the reasonableness of the applicant's explanation for the default; (ii) the bona fides of the application to rescind the judgment; and (iii) the bona fides of the defence on the merits of the case which carries some prospect of success. These factors must be considered not only individually but in conjunction with one another and with the application as a whole."

[1] *Stockil v Griffiths* 1992 (1) ZLR 172 (S), *Ndebele v Ncube* 1992 (1) ZLR 288 (S), *Zimbabwe Banking Corporation v Masendeke* 1995(2) ZLR 400 as well as *Deweras Farm (Pvt) Ltd & Ors v Zimbank* 1997 (2) ZLR 47 (H), *Deweras Farm (Pvt) Ltd & Ors v Zimbank* 1998 (1) ZLR 368 (S), and *V Saitis & Co (Pvt) Ltd v Fenlake* (Pvt) Ltd 2002 (1) ZLR 378 (H).

THE DISPUTE BETWEEN THE PARTIES

[5] I will refer to the parties hereunder as Mudhawin (applicant) and Energy Park (respondent). Energy Park instituted proceedings against Mudhawin under case number HCHC 244/23, seeking an order for payment of US$67,914-00 plus ancillary relief. The capital sum being the amount due by Mudhawin for fuel supplied to it under an oral contract. The contract is alleged to have subsisted for the period 28 April 2022 to 13 August 2022.

[6] Mudhawin defended the claim and filed a counter claim demanding US$111,600 as damages for breach of contract. With the closure of pleadings, the matter was set down for a pre-trial case management conference on 23 December 2023 in terms of r 19 of the Commercial Court Rules. Mudhawin and its legal practitioners were in default of attendance and the order set out above was issued. Mr Chemist Sibanda, who described himself as "the director" for Mudhawin deposed to the founding and answering affidavits. A supporting affidavit from Ms Vimbai Racheal Muzambi, Mudhawin' s legal practitioner, was also filed in support of the application.

EXPLANATION FOR THE DEFAULT

[7]. Apparently, the default was caused by a mishap at Mudhawin' s legal practioners-*V. Nyemba and Associates*` office. Essentially, Mr Sibanda` s attempt at explanation for the default amounted to hearsay. Further, the issues which he sought to canvass were strongly contested in the opposing affidavit.

[8] In that respect, the material averments to that effect were likely to cause the prejudice contemplated in s 48 (1) (c) of the Civil Evidence Act [Chapter 8:01] (see also *Jean Hiltunen v Osmo Hiltunen* HH 99-08.) As such, I rule paragraphs 5 to 8 of the founding affidavit and paragraphs 2 to 3 in the answering affidavit as inadmissible.

[9] Similarly, the affidavit attached to the applicant`s answering papers by a Ms Chiota, was irregularly filed in breach of r 31 (1). This rule prohibits the filing of further affidavits after an answering affidavit, without leave of the court. Accordingly, the affidavit will be struck out

and its contents disregarded. My decision to excise the above evidence is informed by r 26 (4) (a) of the Commercial Court Rules which requires that; -

> (4) An affidavit filed with a written application—
> (*a*) shall be made by the applicant or respondent, as the case may be, or by a person who can personally swear positively to the facts or averments set out therein; and….

[10] The wording in this rule is similar to that in rr 30,31,58 and 107 of the High Court Rules, as well as corresponding provisions in the old High Court Rules 1971. The wording has been interpreted in various authorities including *CABS v Magodo HH 34-22, Bubye Minerals (Pvt) Ltd & Anor v Rani International Ltd* SC 60-90 and *Newman Chiadzwa v Herbert Paulerer* SC 116-91.

[11] In the latter decision, it was held that the test of a deponent`s compliance with the above requirement was to establish if such person would stand as a competent viva voce witness. Meanwhile, the following summary emerges from Ms Muzambi`s account; -

i. Counsel inherited the matter from her former principal Mrs Nyemba.
ii. Since she was yet to register a profile on the IECMS platform, notifications for developments on case number HCHC 244/23 were sent to her former principal Mrs Nyemba`s account.
iii. On a date not quite apparent from her affidavit, but which she describes as "on the day in question", Ms Muzambi`s personal assistant (PA) entered a wrong date of "this particular hearing".
iv. Consequently, she was unaware of the scheduled set down of the matter for the pre-trial case management conference.
v. She proceeded to argue or attend to a different matter in the High Court. She was also unable to immediately extricate herself from that matter to attend to HCHC 244/23 when she was alerted of the commitment.

[12] Mr *Mutero* for Mudhawin acknowledged that applicant was precluded from attending at the pre-trial conference due to the inadvertence at its legal practitioners`. Counsel fully appreciated the position set out by STEYN CJ in *Saloojee & Anor NNO v Minister of*

Community Development [and cited with approval by DUMBUTSHENA CJ in *S v McNab* 1986 (2) ZLR 280 (S)] 1965 (2) SA 135 (AD) at 141C-E that; -

> "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. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact, this court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this court was due to neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are. (Cf *Hepworths Ltd v Thornloe & Clarkson Ltd* 1922 TPD 336; *Kingsborough Town Council v Thirlwell & Anor* 1957(4) SA 533(N).)"

[13] This position has been consistently followed in the jurisdiction. ZHOU J refers to a "a welter of authorities" on the point in *Friendship v Dick* HH 128-13. These include *Diocese of Harare v The Church of the Province for Central Africa* SC-9-10 and *Thokozile Zinondo v CAFCA Limited* SC 64-17. Mr. Mutero referred, in the heads of arguments filed on behalf of Mudhawin, to *Zimbabwe Banking Corporation v Masendeke, Dhliwayo v Matukutire HH 326-23, Divvyman Enterprises (Pvt) Ltd v Cersperk Marketing (Pvt) Ltd & Anor HH 790-22,* being instances where legal practitioner infraction was pardoned by the courts.

[14] It is necessary to note that in the *Diocese of Harare v The Church of the Province for Central Africa, Thokozile Zinondo v CAFCA Limited* SC 64-17 and *Friendship v Dick,* the courts did not absolve a party for the aberrations of its legal practitioner. Applying the above principles to the present matter, I note the following; -

[15] The explanation for the default is wholly inadequate. Mr Sibanda`s contentions in that regard were jettisoned as inadmissible. So was the supporting affidavit of Ms Chiota, the personal assistant who allegedly mis-diarised the matter. This left Ms Muzambi`s rather hollow

rendition of why applicant did not honour the case management conference. The version generates more questions than it does answers.

[16] The mishap caused applicant to miss a pre-trial case management conference. The purpose of pre-trial case management includes importantly, the need to explore and if possible, secure a speedy resolution of the dispute, a principle well-entrenched in the jurisdiction. (See *Doelcam (Pvt) Ltd* v *Pichanick & Others* 1999 (1) ZLR 390(H) at 397C-E. The import of this stage of legal proceedings under the Commercial Court Rules was extensively discussed by CHIRAWU-MUGOMBA J in *Centenary Tobacco (Pvt) Ltd v CMED* (Pvt) Ltd HH 591-24.

[17] Consequently, one then raises the question; - what steps if any had Ms Muzambi taken in preparation for this conference? Had counsel invited and made arrangements with client to attend the meeting? Clearly none of these formalities had been observed. Ms Muzambi`s explanation is an oblique, rather than earnest admission of such inadequacies.

[18] Counsel`s explanation does not carry the persuasive ring necessary to give assurances that the default arose out of mere inadvertence. The point being that even if she had managed to attend the hearing, unprepared and without client, we can only speculate as to the likely outcome of such attendance. The default went beyond the mere failure to attend.

[19] Mr *Muzondiwa* for Energy Park also noted and correctly so, the deficiencies in counsel`s supporting affidavit on the specific dates concerned. I am in agreement with Mr *Muzondiwa* that Ms Muzambi`s explanation lacked probity required of applicants in matters of this nature. A full explanation is prerequisite to accentuating the circumstances of a breach-complete with its mitigatory factors. Herein, one is left none the wiser as to whether in fact the default was not wilful.

[20] That aside, even as it stands, the record of what transpired does not exonerate the legal practitioners. I may state that the functionalities of the IECMS platform accorded the legal parties and their respective legal practitioners several conveniences designed to eliminate the very challenges that led to a default. Upon her own admission, Ms Muzambi was administering the firm`s litigation on the basis of borrowed IECMS credentials.

[21] Such arrangement, was untenable and opened the situation to the all manner of administrative mishaps including that which eventually occurred. On that basis, I am not persuaded that a plausible explanation has been tendered for the default.

BONA FIDES OF APPLICATION AND PROSPECTS OF SUCCESS ON THE MERITS.

[22] The dispute between the parties derives from two contracts. The first, and clearly more ascendant, being a verbal contract for the supply of fuel. The second and ancillary one being a document titled Deed of Pledge executed on 22 April 2022. In terms of the latter contract, Mudhawin surrendered as security for obligations to Energy Park, an immovable property- Stand 311 Gatooma Township of Stand 201 Gatooma Township of Railway Farm in Kadoma.

[23] I may observe in passing that Energy Park`s prayer that this property be declared especially executable, was not granted under the default judgment Nonetheless, the parties` Deed of Pledge is exactly what it purports to be; -a security document. It deals with the identification, description, surrender, preservation and release of the immovable property offered as security.

[24] But as security for what? The common position taken by counsel from both sides was that the agreement secured the credit arrangements under the oral fuel supply contract. The Deed of Pledge does not, however, illuminate the terms of the rather tenebrous verbal contract for the supply of fuel.

i. Clause 1.1 stipulates that "Subject to, and in accordance with all the terms and conditions of credit facilities which may be extended to the borrower from time to time, and at the sole discretion of the lender, the Borrower has borrowed from the Lender the principal amount of USD100,000 …...which amount may be increased from time to time at the sole discretion of the Lender."

ii. Clause 2.1 refers to "…the principal amount of the loan and all other sums payable pursuant to the terms of any credit facility tendered to the borrower…."

[25] I turn to the verbal contract itself. In paragraph 3 of its declaration in HCHC 244/23, Energy Park having stated that the parties concluded a sale of diesel agreement adverts to the

following; - *"In terms of the oral agreement, the Plaintiff had the obligation to supply Diesel 50 to the Defendant and the Defendant had the obligation to pay for Diesel 50 supplied to them timeously."*

[26] Mr Sibanda`s founding affidavit makes a rather cursory reference to the terms of the verbal contract; -namely that Mudhawin enjoyed a revolving credit whose headroom was fixed at US$100,000. In similar vein, Energy Park does not yield much in its opposing affidavit. The answering affidavit mellows this reticence by slightly by referring to the revolving credit as basis for Mudhawin` s claim in reconvention.

[27] Mr *Mutero* submitted that the applicant enjoyed strong prospects of upsetting the plaintiff`s claim on the merits, as well as prevailing on the counter claim for damages in the sum of US$ 110,000. Counsel placed considerable emphasis on the revolving credit terms of the verbal contract. He argued that the amount claimed, though owing, was not yet due. Energy Park was obliged to place Mudhawin in mora before instituting proceedings.

[28] On the same basis, counsel contended that Mudhawin`s counterclaim for damages for breach of contract arising from cessation of deliveries was bound to prevail. Mr *Muzondiwa, on* the other hand, drew attention to the letter dated 6 January 2023 addressed by Mudhawin to Energy Park over the matter.

[29] In that communication, Mudhawin (i) apologised for breaching its obligations to pay, (ii) stated that the abrupt stoppage of fuel supplies caused the default, (iii) admitted indebtedness to the amount of $67,914, (iv) proposed payment terms commencing with US$10,000 on 10 January 2023 and US$5,000 thereafter. This letter constituted an unequivocal admission of indebtedness, according to Mr. *Muzondiwa*.As such, it exposed as incorrect, Mudhawin`s position that it enjoyed good prospects on the merits.

ANALYSIS OF THE ARGUMENTS

[30] As noted above, the prospects or otherwise of the applicant`s case will issue from the contractual terms governing the parties` relationship. It those terms which should assert its rights and entitlements capable of repelling the claim in main and defence in convention. Both

counsel were aligned on the sacrosanct principle of law that courts must not make a contract for the parties. The oft cited passage is PATEL JA (as he then was) `s guidance in *Kundai Magodora & Ors v Care International Zimbabwe* 2014 (1) ZLR 397 (S) at 403 C-E where PATEL JA stated the following:

> "In principle, it is not open to the courts to rewrite a contract entered into between the parties or to excuse any of them from the consequences of the contract that they have freely and voluntarily accepted, even if they are shown to be onerous or oppressive. This is so as a matter of public policy. See *Wells* v *South African Alumenite Company* 1927 AD 69 at 73; Christie: *The Law of Contract in South Africa* (3rd ed.) at pp. 14-15. Nor is it generally permissible to read into the contract some implied or tacit term that is in direct conflict with its express terms. See *South African Mutual Aid Society* v *Cape Town Chamber of Commerce* 1962 (1) SA 598 (A) at 615D; *First National Bank of SA Ltd* v *Transvaal Rugby Union & Another* 1997 (3) SA 851 (W) at 864E-H."

[31] See also *Legacy Hospitality Management Services Limited v African Sun Limited & Anor* SC 43-22. The question then is what were the terms of the two sets of contracts? Namely the oral fuel supply agreement and written Deed of Surety? As already observed, neither party proffered much detail on the terms or operationalization of same that could give a clearer view of the oral contract.

[32] These could include matters such as when exactly did the arrangement commence, what were the cycles or frequency governing the supply of fuel and payment thereof? How many transactions had been conducted prior to default? What were the transactional modalities? Modes of payments? What of transactional documentation? Any formalities such as regulatory, tax or transportation licenses or permits? When did the default occur? The Deed of Surety and headroom concerned?

[33] The Deed of Surety is equally unhelpful. If anything, that document ironically obfuscates matters even further. It is an unequivocal memorandum purporting to secure a loan extended to Mudhawin by Energy Park. The submissions on the essence and structure of the revolving credit under fuel supply contract are not quite aligned to the cause of indebtedness as described in the Deed of Surety. That aside, the Deed of Surety itself did not advert in any detail, to the terms of the underlying credit arrangement.

[34] Mr. *Mutero*` s position was effectively that the weakness of Energy Park`s case translated to the strength of Mudhawin`s prospects on the merits. Secondly, Mudhawin itself stated in the founding affidavit filed on its behalf, that its prospects mainly lay in the counter claim. The counter claim constituted in that regard, both a spear and shield. Both arguments were dependent as stated above, on a demonstration of Mudhawin`s rights under the two contracts. But ascertaining Mudhawin`s rights became difficult because the contractual terms could not be established with the clarity necessary to support Mudhawin`s averments.

[35] Mr *Muzondiwa*, obviously shooting himself somewhat in the proverbial foot. did effectively admit that the oral contract`s terms were unclear. Counsel referred to the decision of *Delta Beverages (Pvt) Ltd v Pyvate Investments (Pvt) Ltd & Anor* HH 135-18 where DUBE J (as she then was) held at page 4 that; -

> "Generally, oral contracts are enforceable and do give rise to valid contractual relationships. The oral contract, sometimes referred to as the invisible contract, is one of the most difficult to prove. What makes this so is the lack of hard evidence of the existence of the contract. The essentials of a verbal contract are the same as those of a written contract. There must be offer and acceptance of the contract, existence of consideration, the parties must have the capacity to enter into the contract and the parties must intent to enter into the contract and create a binding legal relationship. The courts will not endorse an oral agreement were any of the essential elements of a valid contract have not been proved. The terms of the oral contract must be proved and there must be agreement and understanding of the terms of the contract by the parties. An oral contract that meets all the requirements of a contract is binding on the parties and gives rise to a legally enforceable relationship. There must be a meeting of the minds or a reasonable belief by the parties that there is consensus. A party who alleges the existence of an oral contract has the onus to prove the existence of the contract on a balance of probabilities."

[36] I refer to the above summation of the law on oral contracts to reiterate the difficulties presented herein by the lack of clarity of the terms of the oral contract. The issue is obviously

not to question the existence or validity of that contract. That was the duty of the trial court which awarded judgment in default.

[37] The task herein, is to assess the veracity of the defence and counter claim to establish if they constitute good and sufficient cause to set aside the default judgment. That process requires a ventilation of the parties` respective rights and obligations under the contract, an exercise entirely reliant of the fuller terms which, as stated, are not present.

[38] Further, it is necessary to recognise the posture adopted by Mudhawin on prospects of success on the merits. Mr *Mutero* did raise the legal argument that since the time for performance of the contract (namely payment for the fuel supplied) was not fixed, Energy Park was obliged to place Mudhawin in *mora* via a demand. Since such was not done, the claim was filed prematurely.

[39] Counsel faced two hurdles in moving this argument; - the factual and legal. Factually, this defence was not raised in the founding affidavit. Mudhawin`s protest on the facts, was that Energy Park frustrated performance and breached the parties` agreement by an abrupt cessation of fuel supplies. Additionally, the submission by counsel did not attach itself to an exposition of the terms of the contract.

[40] Which takes the matter into the legal realm on whether the contract required the invocation of *mora in re* or *mora in persona*. (See *Rolen Trading (Pvt) Ltd v Parkside Holdings (Pvt) Ltd* SC 106-22). It is an established principle of law that a debtor can also be placed in mora by issuance of legal process such as summons. In the absence of clear terms defining payment obligations, then the argument on *mora* cannot sustain.

[41] Mudhawin`s prospects of resisting respondent`s claim were anchored entirely on the counter claim for damages for breach of contract. In order to assess such prospects, one must commence with the principles setting out what a claimant in the position of Mudhawin must prove in order to succeed. A party seeking damages for breach of contract must prove causation and quantum. This position was stated as follows in *Wynina (Pvt) Ltd v MBCA Bank Limited* SC 27-14 per GOWORA JA (as she then was); -

> "Recent authorities from the courts in South Africa suggest that there is need to differentiate between the *onus* imposed on a plaintiff regarding causation and quantum. In *De Klerk v Absa Bank Ltd & Ors* SALR 2003 (4) 315 SCHULTZ JA quoted with approval the remarks of STUART-SMITH LJ in *Allied Maples Group Ltd v Simmons & Simmons* (A Firm) [1995] 1WLR 1602 (CA) to the following effect:
>
> "In my judgment, the plaintiff must prove as a matter of causation that he has a real or substantial chance as opposed to a speculative one. If he succeeds in doing so, the evaluation of the chance is part of the assessment of the quantum of damage, the range lying somewhere between something that just qualifies as real or substantial on the one hand and near certainty on the other. I do not think that it is helpful to seek to lay down in percentage terms what the lower and upper ends of the bracket should be.""

[42] The question is; - how does Mudhawin`s counterclaim stand insofar as that standard of proof is concerned? In my view, Mudhawin as stated, is basing its prospects on the uncertainty of the terms of the oral contract. Mr. *Mutero* himself submitted that the grey areas warranted a reopening of the matter in order to permit ventilation of the issues via evidence at trial.

[43] The critical point to rase becomes; -what other evidence can Mudhawin place before a trial court, apart from that which has been adverted to in the founding and answering affidavits? How does Mudhawin propose to cure the same paucity echoing in the vacant chambers of these same two affidavits? It is one matter for a party seeking damages to approach the court and pray for an award based on scant evidence of liability and especially quantum.

[44] But it is entirely a different case for the same party, ousted from the court by default, to found its prospects of success on the tenuous terms of an obscure oral contract. All in the hope that such will be charitably considered by the trial court if the matter were to proceed and be heard on the merits. This observation exposes the precarious nature of Mudhawin` s prospects of success of its pivotal argument on the counter claim.

DISPOSITION

[45] I detect no bona fides in an application whose promoter admitted to liability and undertook to pay, but has proffered no evidence of adhering to such promise. No explanation was tendered for the failure. Respondent raised this point in its opposing affidavit. Further, the applicant`s counter claim for damages, which has been proffered as the basis of the rescission, was only instituted after Energy Park drew first blood.

[46] In addition, I take note of the fact that this dispute originates from transactions conducted as far back as 2022. Similarly, the present proceedings trace their roots to 2023. Which means the matter has been doing the rounds so to speak, for the better part of three years. There must be finality to litigation. This being a principle underscored by r 4 (2) of the Commercial Court Rules as read with the Second Schedule.

[47] Both provisions exhort courts to facilitate the expeditious resolution of commercial disputes. Expediency becomes, on the facts before me, a relevant aspect in considering good and sufficient cause. It being noted of course, that expediency is inseparable from established substantive, adjectival as well as natural justice legal principles. (See *Inebriant Cache & Anor v French Smith Trading as Customs Services* SC 89-24).

[48] In conclusion, no plausible explanation was tendered to account for the default. Similarly, the applicant was unable to demonstrate bona fides of the application nor prospects of its success on the merits. I detect no good and sufficient cause to set aside the default judgment entered by this court on 1 December 2024.

[49] The application cannot succeed. Neither should the respondent`s prayer for punitive costs. In its heads of argument, respondent does no more that refer to the deficiencies in applicant`s case as sole basis for claiming punitive costs. That argument and approach is inconsistent with the authorities` treatment of the trite subject of punitive costs.

Accordingly, it is hereby ordered that; -

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

V.Nyemba and Associates-applicant`s legal practitioners

Saidi Law Firm-respondent`s legal practitioners

[CHILIMBE J____17/6/25]