

RYAN ALEXANDER GARIZIO

And

M GARIZIO PROPERTIES (PVT) LTD

And

ZIMBABWE SPRING STEEL (PVT) LTD

Versus

MUYENGWA E MOTSI

And

THE SHERIFF OF ZIMBABWE N. O

HIGH COURT OF ZIMBABWE

COMMERCIAL DIVISION

CHILIMBE J

HARARE 20 February 2024 and 19 February 2025

Application for rescission of judgment

H. Mutasa for the applicants

S.M. Hashiti for first respondent

No appearance for second respondent

CHILIMBE J

BACKGROUND

[1] On 20 February 2024, I dismissed the application for rescission of judgment and gave my reasons *ex tempore*. Written reasons have since been requested and I provide same hereunder.

THE ORIGINAL DISPUTE

[2] A perceptible tendency toward non-disclosure characterised the pleadings from both sides. It taxed the extraction of a coherent story behind this dispute as it did also the truth of what transpired. Nonetheless, the facts are as follows; -first applicant obtained a loan from a peregrine entity known as ECB Mauritius Limited, (“EBC Mauritius”). Second and third

applicants are alleged to have secured this loan through suretyships including surrender of an immovable property. Alleging default, first respondent sued and obtained the default judgment now under consideration.

[3] For convenience, I will refer to the parties as Mr. Garizio (first applicant), Garizio Properties (second applicant), Zimbabwe Spring Steel (third applicant), Mr Motsi (first respondent) and the Sheriff (second respondent). An additional sibling to the applicants-C.M.G Power Zimbabwe (Pvt) Ltd, (“C.M.G. Power”)- featured prominently despite not being party to the proceedings.

[4] The applicants and C.M.G. Power are related parties. It also appears that Mr. Garizio is what is ordinarily called a “key man” in the Garizio Properties, Zimbabwe Spring Steel and C.M.G. Power. But the details on the commonality of shareholding and interest were not disclosed.

[5] Nor did the applicants volunteer further information regarding the nature or purpose of the EBC Mauritius loan, its disbursement and whether it was on-or offshore. Given the contestations in the dispute now before the court, these further details of applicants’ relationships were essential.

[6] But the taciturnity continued. Mr. Motsi himself pleaded in the original and present matter that the applicants’ further particulars were to him unknown. I find this style of pleading, in many instances, not only archaic and unnecessary, but oftentimes outrightly misleading. It is improbable that the US\$750,000 transaction at the centre of the dispute was neither preceded nor accompanied by an extensive due diligence over the 3 applicants and C.M.G. Power.

[7] That aside, the issues in this dispute oscillate around interpretation of the loan and security agreements executed between the applicants, C.M.G. Power, and ECB Mauritius. I list them hereunder; -

	AGREEMENT	DATE	PARTIES	DESCRIPTION
1.	Acknowledgement of Debt Herein “the Garizio -EBC	6/2/015	Issued by Ryan Alexander Garizio in favour of EBC Mauritius.	Mr. Garizio acknowledged his indebtedness to EBC Mauritius in the sum of US\$750,000 plus interest

	acknowledgement of debt”			in the sum of US\$344,312,57
2.	Cession in Securitatem Debiti Herein “the C.M.G - EBC security cession agreement”	6/2/2015	Issued by C.M.G Power represented by Mr. Garizio in favour of EBC Mauritius	Secured the above indebtedness
3.	Deed of Suretyship Herein “the Garizio Properties Guernsey suretyship”	25/2/2013	Issued by Garizio Properties represented by Marco John Garizio and Denise Garizio in favour of EBC Guernsey Limited	Ongoing security to cover future indebtedness over Stand 18115 Harare Township, (herein called “41 Plymouth Road, Southerton, Harare”.)
4.	Deed of Suretyship Herein “the Spring Steel-EBC suretyship”	2015	Issued by Zimbabwe Spring Steel represented by Mr. Garizio in favour of EBC Mauritius	Secured Mr. Garizio’s indebtedness to EBC Mauritius.
5.	Memorandum of an Agreement and Cession and Assignment and Assignment Herein “the Motsi-EBC cession agreement”	2/6/2020	EBC Mauritius Limited in favour of E. Motsi and Associates Legal Practitioners	EBC Mauritius ceded its rights under the Garizio - EBC acknowledgement of debt and attendant security to E. Motsi and Associates law firm

[8] I will revert in greater detail to these agreements below. Nonetheless, as stated above, Mr. Motsi issued summons against the applicants under case number HCHC88/23. On 8 May 2023, this court issued in default, the below order in HCHC 88/23; -

1. The 1st to the 3rd defendants shall jointly and severally pay the plaintiff the sum of United States dollars, eight hundred and thirty thousand, seven hundred and seventy - six dollars and sixty-one cents (US\$830,776.61) together with interest at the rate of 2.5% per month calculated from the 1st of June 2020 compounded monthly to the date of payment in full.
2. Stand no. 18115 Harare township known as 41 Plymouth Road, Southerton Harare, held under deed of transfer no. 6526/94 in favour of M Garizio properties (pvt) Ltd, be and is hereby declared especially executable in satisfaction of the debt described in paragraph one above.

3. The 1st -3rd defendants shall pay collection commission jointly and severally one paying the other to be absolved.

THE DEFAULT JUDGMENT

[9] The above judgment was entered in default in terms of r 14 of the High Court High Court of Zimbabwe (Commercial Division) Rules SI 123/20, (“the Commercial Court Rules”). This rule allows a plaintiff whose case has not been met by a plea as set out in r 12(1), to apply for a default judgment.

[10] It must be noted that in the Commercial Court, r 12 (1) grants the defendant a **lesser** period of **7 days** within which **to file its plea** after service of summons. Rule 10 (1) on the other hand, extends to the same defendant a **longer** period of **10 days** to file its **appearance to defend**. The rules say; -

10 (1) The time within which a defendant shall be required to enter **appearance to defend** shall be **ten days** from the date of service, exclusive of the day of service.

12 (1) The defendant shall **file a plea, exception, special plea or other answer** within **seven days** of service of the plaintiff’s summons and declaration issued and served under these rules.

[11] These simple requirements often confuse litigants, the parties now before me included. Yet the prescription in the rules is straightforward. Defendant; if you must file your appearance to defend and plea separately, then file the plea first (within 7 days) and the appearance afterward (but within 10 days).

[12] Judgment was thus properly taken against the applicants in terms of r 14 for failure to file their plea within 7 days. Equally, the application for rescission was correctly moved under r 15 which deals with the setting aside of default judgments entered per r 14. This should dispose the preliminary arguments on that point. I now move to the application itself.

THE APPLICATION FOR RESCISSION DEFAULT JUDGMENT

[13] The applicants filed the current application on 30 May 2023 together with their draft plea and summaries of evidence as required by r 15 (3) of the Commercial Court Rules. Mr Motsi

also filed a notice of opposition to which he attached a replication and a bundle of documents. These included the Spring Steel-EBC suretyship.

[14] The anomalous replication drew no protest from the applicants. Further, both sides studiously ignored the Spring Steel-EBC suretyship. Their papers, written and oral submissions said absolutely nothing about this Spring Steel-EBC suretyship. Yet the determination of this matter largely rested on this suretyship. I will return to it below.

EXPLANATION FOR THE DEFAULT

[15] It is common cause that the summons commencing action were served at the offices of Messrs Whatman and Stewart legal practitioners in Harare on 9 February 2023. The applicants averred that this service was defective. That legal firm had no instructions to receive process. Further, the applicants claimed that, the summons were not timeously brought to their attention.

[16] The applicants indicated that they only became aware of the proceedings upon service on second respondent of the default judgment on 18 March 2023. Additionally, the applicants insisted that service ought to have been effected at 41 Plymouth Road, Southerton in Harare. This being the *domicilium citandi et executandi* nominated in the C.M.G -EBC security cession agreement. On that basis, the applicants averred that they had not been in wilful default.

[17] Mr. Whatman deposed to a supporting affidavit. Whilst confirming service of summons on his firm, he disputed that he had the mandate to receive process. This was so despite his previous conformation to that effect. But such affirmation had been issued in June 2020, some 3 years previously when he was practising with Matizanadzo and Warhurst.

[18] Mr. Whatman`s receptionist Ms Norma Mapepa also deposed to a supporting affidavit. She described how the summons fell victim to office inadvertence. Consequently, same could not be timeously brought to the applicants` attention.

[19] Mr. Motsi contended that Mr. Whatman`s unequivocal confirmation of mandate to receive service still held. Never mind that such undertaking had been issued during Mr. Whatman`s partnership with Matizanadzo and Warhurst 3 years previously.

THE BONA FIDES AND PROSPECTS OF THE DEFENCE

[20] The defendants contended that their defence carried firm prospects of success on the merits. Their defence went as follows; -

- i. That the cession in debiti agreement (“the C.M.G -ECB cession agreement”) relied upon by first respondent was executed between C.M.G Power Zimbabwe (Pvt) Ltd and EBC Mauritius rather than with the applicants.
- ii. That the deed of suretyship (“the Garizio Properties -Guernsey suretyship”) also forming the basis of the claim was executed in favour of an entity known as Guernsey Limited and not EBC Mauritius Limited. Further, it was so signed 3 years before Mr. Garizio’s loan.
- iii. That Mr. Motsi had no locus standi to institute proceedings in HCHC 88/23 because EBC Mauritius’s ceded its rights under the loan agreement (“the Motsi-EBC cession agreement”) to E. Motsi and Associates Legal Practitioners and not Mr. Motsi.
- iv. That the claim had been impaired by prescription.
- v. That the loan was “never registered with the Regulatory Authority” and did not qualify as a foreign obligation.
- vi. That payments in partial liquidation of the loan amount were ignored by the creditor.
- vii. That “the creditors” rejected Mr. Garizio’s tender of payment thus obstructing him from performing his obligations under the agreements.
- viii. That no document had been placed before the court to link Zimbabwe Spring Steel to the claim raised in the summons.

THE LEGAL PRINCIPLES GOVERNING APPLICATIONS FOR RESCISSION OF JUDGMENT

[21] The law is well settled on this point. Counsel was also aligned on the applicable principles set out in the authorities. The included the older decisions like *du Preez v Hughes NO 1957 R&N 706 (SR)* and *GD Haulage (Pvt) Ltd v Mumurgwi Bus Service (Pvt) Ltd 1980 (1) SA 729*.

[22] The latter jurisprudence in *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).

[23] A court must, from the foregoing authorities, be satisfied that there is good and sufficient cause to set aside a judgment obtained in default. This principle is further asserted in r 15 of the Commercial Court Rules which provides thus in r 15 (2); -

(2) In considering whether to rescind the judgment under this, rule the court shall have regard to whether the aggrieved party has—

(a) applied to the court within the period specified under sub rule (1);

(b) given good and sufficient reasons for failing to file a plea;

(c) demonstrated reasonable and good prospects of success on the merits;

(d) filed a draft plea, summary of evidence and, where applicable, the documentary evidence relied upon in support of his or her or its defence; and

(e) provided security for costs in favour of the judgment creditor as may be prescribed by the registrar.

[24] The Supreme Court explained the considerations constituting good and sufficient cause in the following terms per GUBBAY JA (as he then was) in *Stockil v Griffiths* (supra) at p 173 that:

“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 226E-H; *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.”

[25] 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?

WERE THE APPLICANTS IN WILFUL DEFAULT?

[26] Was the service of summons defective? I do not believe so and the following are my reasons. To begin with, the applicants disowned the very agreement in which that *domicilium citandi et executandi* of 41 Plymouth Road, Southerton was selected. Secondly, Mr. Mutasa for the applicants introduced in his oral submissions, a fresh argument not stated in the papers.

[27] He pointed out to another *domicilium citandi et executandi*; - Number 5, Mayorca Flats, 8 Erskine Road, Mt Pleasant, Harare. This being the address chosen in the Garizio -EBC acknowledgement of debt. Thirdly, I note that there were 4 different agreements, 4 different (but related) parties and each with a separate election for *domicilium citandi et executandi*.

[28] Further, the applicants substituted the *domicilium citandi et executandi* with their legal practitioners'. Having done so, the applicants did not give subsequent notice of a change of address. I refer to the principle expressed by MAVANGIRA JA in *Muzanenhamo v Fishtown Investments (Pvt) Ltd & 3 Ors* SC 8-17 at page 10 to the effect that; -

“The party whose domicile is the given address usually has the onus of notifying the other signatory to the agreement of any change in such address. In casu no such notification of change of address was done by the second and third respondents. In addition, the Deputy Sheriff was not at any stage pointed to any other address.”

[29] Which brings me to Ms Norma Mapepa's inadvertence which to me reads no more than an ordinary though undesirable mishap at a law firm. It did not translate to wilful default on

the part of the applicants. A somewhat similar scenario faced the Supreme Court in *Zimbabwe Banking Corporation Limited v Masendeke* 1995 (2) ZLR 395 at page 402.

[30] A reason for the delay was tendered. I have no hesitation in accepting Mr. Whatman and his receptionist`s accounts on how the papers were misplaced¹. Wilful default was described as follows by McNALLY JA in *Deweras Farm (Pvt) Ltd & Ors v Zimbank* 1998 (1) ZLR 368 (S) at page 369; -

“I favour the definition of wilful default offered by King J in *Maujean t/a Audio Video Agencies v Standard Bank of South Africa Ltd* 1994 (3) SA 801 (C) at 803H-I: - “More specifically, in the context of a default judgment, “wilful” connotes deliberateness in the sense of knowledge of the action and of its consequences, i.e. its legal consequences and a conscious and freely taken.””

THE BONA FIDES OF THE APPLICATION, DEFENCE AND PROSPECTS ON THE MERITS.

[31] I am required to establish the bona fides and potential veracity of a defence tendered by a debtor facing a claim over his unpaid debt. The bona fides in an application for rescission of judgment has been expressed in the following terms by this court; -

Robson Makoni v CBZ Bank Limited HH 357-16 per CHITAKUNYE J (as he then was) at page 6,

“In order for a defence to be *bona fide* and to carry some prospects of success it must be credible *ex facie*. A defence based on misrepresentation of facts may not be such a defence.”

Dr Walter Mangezi v Dr Tonderai Irvine Tipere Kasu HH 132-24 at page 14 per MUREMBA J,

“This simply means that the applicant’s defence must have a reasonable chance of prevailing or achieving a favourable outcome. The defence should be valid and not

¹ See MALABA JA (as he then was) `s remarks at page 20 in *M.B. Ziko (Pvt) Ltd and Manase & Manase Legal Practitioners v Cestaron Investments (Pvt) Ltd and Kilberry Investments (Pvt) Ltd* SC 68-07; -

futile or purely speculative. It should be sincere, substantive and have a reasonable chance of success. In *casu* the applicant disputes that he defamed the respondent.”

[32] I now turn to the defences tendered as outlined in paragraph [20] above. I may state that the heads of argument filed on behalf of the applicants only dwelt on items (ii), (iii), (iv), (vi), and (vii). In the oral submissions, Mr. *Mutasa* for the applicants specifically abandoned the defence of prescription (iv). He also did not pursue (v), (vi) and (vii) with much ardour. Which left the defence effectively hanging on (ii) and (iii).

[33] One may well-understand the route chosen by Mr. *Mutasa*. The matter before the court was predicated on the Garizio -EBC acknowledgement of debt issued by Mr. Garizio in favour of EBC Mauritius. This document anchored the plaintiff’s claim in HCHC 88/23. It effectively lay unchallenged. The implication being that Mr. Garizio borrowed money from EBC Mauritius. He did not- in his founding affidavit- confirm positively that he had discharged his indebtedness.

[34] Instead, he laid out about 8 grounds in seeking to escape liability. For liability is indeed what he must demonstrate he can escape if he is to succeed in the main matter on the merits. That is the critical issue which must guide the examination of this matter. I again repair to the authorities to restate the applicable test. In *Zimbabwe Consolidated Diamond Company (Pvt) Ltd v Adelcraft Investments (Pvt) Ltd* CCZ 2/24 the court said:

“The test for reasonable prospects of success postulates an objective and dispassionate decision, based on the facts and the applicable law, as to whether or not the applicant has an arguable case in the intended application should direct access be granted. The prospects of success must not be remote but must have a realistic chance of succeeding. In this respect, a mere possibility of success will not suffice. There must be a sound rational basis for the conclusion that there are prospects of success in the main matter. This court must be satisfied that the applicant has an arguable *prima facie* case and not a mere possibility of success. See *Essop v S* 2016 [ZASCA] 114; *S v Dinha* CCZ 11-20, at p 6.”

[35] M Garizio Properties and Zimbabwe Spring Steel each executed separate suretyships in favour of EBC Mauritius over Mr Garizio's indebtedness. These being the (i) Garizio Properties -Guernsey suretyship and (ii) the Spring Steel-EBC suretyship. I will comment on the Garizio Properties -Guernsey suretyship.

[36] The applicants disputed that this agreement related to EBC Mauritius the creditor. Guernsey Limited was alien to the relationship. Mr. Motsi's terse response in the notice of opposition that Guernsey Limited and ECB were the same entity was with respect, rather lame. He could have put matters beyond argument by attaching the usual documentation signifying change or succession in title.

[37] Mr. *Hashiti* (for Mr Motsi)'s position was that no issue was raised over the identity of the creditor during Mr Garizio's correspondence with EBC Mauritius. Nor was that aspect contested during Mr. Motsi's engagements with Mr. Whatman. Counsel stressed the importance of the alleged admission of indebtedness by Mr. Whatman on behalf of the applicants.

[38] My findings on this point are as follows. It is indeed correct that no issue was raised regarding the identity of the creditor. The correspondence between Mr. Garizio and EBC Mauritius confirms that Mr Garizio's indebtedness was secured by the immovable property at 41 Plymouth Road, Southerton [see letter dated 9 January 2020 from EBC Mauritius to Mr Garizio at page 33 of HCHC 88/23].

[39] I note further that the applicants did not explain their relationship with Guernsey Limited. Nor did they (especially Garizio Properties) disclose the transaction that gave rise to the Guernsey suretyship. This explanation was crucial given the following; -firstly, in papers herein, the principal security on view is the immovable asset at 41 Sterling Road, Southerton, Harare.

[40] This asset was target of the suretyship under the C.M.G -EBC security cession agreement² and the Garizio Properties- Guernsey suretyship. Secondly, there is a common thread running

² Under the C.M.G -EBC security cession agreement, C.M.G ceded its 100% shareholding in M Garizio Properties whose only asset was 41 Plymouth Road, Southerton Harare.

between these 2 agreements. It is woven by Mr Garizio via the EBC Mauritius-Guernsey obligation and secured by the same 41 Plymouth Road Sotherton, Harare.

[41] I do take into account as well, the submission by Mr. *Hashiti* that there was no protest over the identity of the creditor by the applicants. The 9 January 2020 letter from EBC Mauritius to Mr Garizio plus other emails exchanged confirm that Mr. Garizio EBC Mauritius as the creditor.

[42] Having regard to the foregoing, I am doubtful of the alleged distinction between Guernsey Limited and EBC Mauritius. The nexus between the applicants, C.M.G Power and the obligation to EBC Mauritius is too persistent to discard.

[43] Accordingly, I am satisfied that there is ample proof to suggest that if Mr. Garizio is unable, as the facts before seem to suggest, to escape from his liability under the acknowledgement of debt, then he will drag his 2 co-applicants down with him.

THE CESSION FROM EBC MAURITIUS TO M.E. MOTSI AND ASSOCIATES

[44] Dismissing the applicants' *locus standi* challenge, Mr. *Hashiti* contended that Mr. Motsi was the M.E. Motsi-sole partner in the sole partnership of M.E. Motsi and Associates. The latter being the nominated cessionary in the Motsi-EBC cession agreement. Mr. Motsi was therefore, according to Mr. *Hashiti*, the alter-ego of the law firm and sole beneficiary of all its assets and receivables.

[45] Even if a distinction were to be made between the law firm and Mr. Motsi, Mr. *Hashiti* argued that Mr. Motsi's entitlement to institute proceedings on behalf of his law firm lay beyond contest.

[46] These submissions were not materially controverted. (See for example the situation that obtained at a law firm in this court's decision of *Kambuzi Mine (Pvt) Ltd v Palframan & 2 Ors* HH 26-16). I am satisfied that Mr. Motsi was properly placed to institute proceedings under HH 88/23. The nature of a partnership at law is well-established. It has been described as follows; -

“Unlike a company (which is an artificial person) a partnership is not a persona apart from its members. It is simply a group of people acting jointly.”³

THE C.M.G -EBC SECURITY CESSION AGREEMENT v THE SPRING STEEL-EBC SURETYSHIP

[47] Mr. Motsi attached to his notice of opposition a replication to the applicants draft plea. I found this pleading premature and irregular. A replication is filed in terms of r 12A of the Commercial Court Rules after receipt of a defendant`s plea. Herein, all we have is a draft plea. I thus disregarded the contents of the replication.

[48] That aside, Mr. Motsi also annexed the Spring Steel-EBC Suretyship to his notice of opposition. Typical of the earlier noted reticence, this attachment was not specifically referred to in the notice of opposition. Nor did the applicants raise any comment about it. These characteristics draw me to refer to the exasperations expressed by the court at page 215 in *Songore v Olivine Industries (Pvt) Ltd (supra)*,

“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.”

[49] The Spring Steel -EBC Suretyship document was not before the court when it granted default judgment in HCHC 88/23. What the plaintiff therein had attached was the C.M.G -EBC security cession agreement. The applicants argued that the C.M.G -EBC security cession agreement was irrelevant for purposes of judgment in HCHC88/23. I considered whether this aspect impaired the judgment as alleged by the applicants in the founding affidavit.

³ Gibson-South African Mercantile & Company Law -8th Edition Juta, 2003 at page 246.

[50] My conclusion was in the negative for the following reasons. Firstly, the applicants prevaricated over this aspect. The argument was abandoned in the heads only to be revived in oral submissions by Mr. Mutasa. Secondly, in that regard, counsel did not comment on the effect of the correct Spring Steel -EBC Suretyship that now lay before the court.

[51] Thirdly, the result being that the evidence of the indebtedness earlier pleaded in the summons and declaration had now been placed before the court. Fourthly, the C.M.G -EBC security cession agreement revealed that C.M.G Power owned 100% shareholding in Garizio Properties.

[52] The question being who were the shareholders of C.M.G Power? And what was their relationship with Mr. Garizio and the EBC Mauritius loan? As fifth, it has already been mentioned that Mr. Garizio had not laid the basis upon which he could escape liability for the EBC loan. I therefore found comfort in these factors and accepted the Spring Steel -EBC Suretyship as the uncontested coupling to Zimbabwe Spring Steel's indebtedness.

DID THE APPLICANTS DEMONSTRATE BONA FIDES?

[53] In conclusion, it is my view that the applicants tended to prevaricate in their papers and argument. They also pleaded in a guarded fashion. They withheld facts which ought to have been shared. Their mutually supportive defence tended to stifle the individuality reposed in each party's peculiar circumstances.

[54] The defence was also tainted by a paucity of detail over the transaction. The applicants filed a draft plea, summaries of evidence and a bundle of documents. I refer to these documents as part of the bona fides considerations. These papers paint a picture at variance with the account in the founding affidavit.

[55] In the founding affidavit, the applicants all issued blanket denials of indebtedness. In the draft plea, they averred that the acknowledgement of debt related, not to a fresh loan disbursement, but to a rolled over facility. In neither instance did Mr. Garizio demonstrate how he could escape liability.

[56] These issues militated against the applicants' bona fides (see *CFI Retail (Pvt) Ltd v Eric Masese Manyika* SC 8-16.) As such, the projection of the applicants' prospects on the merits was diminished by these serrations.

DISPOSITION

[57] The application for rescission of judgment was based on the alleged absence of the contractual agreements establishing the applicants' indebtedness. Clearly, the applicants meant to make the most of what I can only call the inattention of plaintiff who attached the wrong security agreement (C.M.G -EBC Security Cession Agreement) to the papers accompanying the summons. But the effect of that omission could at the most have only exonerated Zimbabwe Spring Steel. The other 2 parties remained linked to Mr. Garizio's obligation to EBC Mauritius as represented by Mr. Motsi.

[58] Sufficient have been my comments regarding the parties' general lack of candour and diligence. Unfortunately, this adverse characteristic impacted the applicants the most. The applicants did not inspire the court over their prospects of success on the merits of the matter. Accordingly, their prayer will be refused.

COSTS

[59] Mr. *Hashiti* cited what ZHOU J once described as “*a welter of authorities*”⁴ in seeking to persuade the court to award costs on the higher scale. I need not detail the said welter herein. I however found no justification in the papers before me to grant that request. Instead, I believe Mr Motsi must thank the tradition of these court which behoves me to let costs follow the successful party. I need not repeat my misgivings in the manner in which his cause was prosecuted. On that basis, I proceeded to issue the below order on 20 February 2024; -

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

Gill, Godlonton and Gerrans- applicants' legal practitioners
M.E. Motsi and Associates- first respondent's legal practitioners

[CHILIMBE J__18/2/25]

⁴ *Friendship v Dick* HH 128-13