ANYWHERE JONASI

Versus

DAIMEN SAILASI

And

THE METHODIST CHURCH IN ZIMBABWE

And

THE REGISTRAR OF DEEDS BULAWAYO

IN THE HIGH COURT OF ZIMBABWE
MABHIKWA J
BULAWAYO 13 JULY 2019 AND 11 JUNE 2020

Court Application For Rescission of Judgement

B A Chifamba, for the applicant
J Nyarota, for the 1st and 2nd respondent
No appearance, for the 3rd respondent

MABHIKWA J: This matter, which has at times splintered into various cases, originates from a very simple issue but has dragged for six (6) long years. The brief history of the matter is as follows;

Applicant states that he entered into a lease agreement with 1st respondent and became his tenant at No. 13 Nesbit, Redcliff, Kwekwe on 1 June 2013. No written agreement has been exhibited. Applicant also does not explain throughout, whether the said lease agreement was written or verbal. Applicant further states that on 14 February 2014, 1st respondent "gave him a right of first refusal" should he decide to sell the property. He claims that when 1st respondent subsequently approached him with a request for financial assistance he (applicant) gave 1st respondent a sum of $8 010-00. He says that he thereafter offered to purchase the house for $40 000.00. He made the offer in writing but did not receive a response.

Applicant later saw a pastor coming to view the house and ultimately was surprised to learn that the Methodist Church of Zimbabwe (2nd respondent) had bought the said house. It

appears to me from the papers that the 2nd respondent either bought the house for the 1st respondent or was represented by the 1st respondent in buying the house.

Applicant then filed case No. HC 1602/14 after initially filing an interdict application at the Kwekwe Magistrate's Court which was dismissed for lack of jurisdiction. HC 1602 was also dismissed by KAMOCHA J (as he then was) for the simple reason that there were material disputes of fact which could not be resolved on the papers. As will be shown later in this judgement, the Judge did not say, or mean as argued by the applicant that he "has prospects of success" in his claims.

In short, there were applications and counter applications in this matter until, after consolidation of the key applications, the matter was set down for trial on 13 March 2018. The applicant was in default, and judgement was granted against him per MOYO J in the following terms; that:-

> "1. The plaintiff's claim in case No. HC 1602/14 be and is hereby dismissed, and the defendant's claims in HC 2166/18 be and hereby granted.
> 2. The order for the eviction of plaintiff and all those claiming occupation through him from stand No. 796 Redcliff, Township of Redcliff Estate also known as house No. 13 Nesbit Road, Redcliff be and is hereby granted.
> 3. Plaintiff to pay arrear rentals in the sum of US$8 750-00 covering the period 1st July 2014 to 30 July 2016 together with interest thereon at the prescribed rate with effect from date of issue of summons to date of payment in full.
> 4. Plaintiff be and is hereby ordered to pay holding over damages on the sum of US$350-00 per month with effect from 1st August 2016 to date of eviction.
> 5. Plaintiff to pay costs of suit on the legal practitioner and client's scale."

It is this judgement by Justice MOYO that applicant herein seeks to have rescinded. On the other hand, the respondents opposed the application on the basis that the applicant had willfully defaulted on 13 March 2018. The respondents argue that the applicant's non-attendance for trial has not been convincingly explained, as he seeks to lay the blame on his

own legal practitioners who in turn produced an affidavit from their own Secretary taking the blame for the non-attendance. Further, the respondents argue that the applicant has absolutely no prospects of success should the matter proceed to trial anyway. Respondents contend that applicant has not, for 6 years pursued his claim in 1662/14 because he knows that he has no prospects of success and thus intends to enjoy occupation of 1st respondent's house without paying any rentals. 1st respondent disputes that applicant was granted the right of first refusal and further argues that in any event, even if it were to be accepted that he was, he still would have no claim legally.

The Law Relating to Rescission of Judgement; Willful Default, "Good and Sufficient Cause" and Prospects of Success

I will re-iterate as was held in *Mushosho v Mudimu & Anor* 2013 (2) ZLR 642 (HH 443-13) that there are three (3) separate ways in which a judgement in default of one party may be set aside. This may be done in terms of Order 9 Rule 63 or Order 49 Rule 449(1)(a) of the High Court Rules 1971, or thirdly in terms of the common law. An applicant is at liberty to elect to use whichever one of those three vehicles best suits the circumstances of his case.

To qualify for relief under Order 9 – 63, the applicant must show that;

a) Judgement was granted in the absence of the applicant under these rules or any other law;
b) The application for hearing was filed and set down for hearing within one (1) calendar month of the date when the applicant acquired knowledge of the judgement.
c) Condonation of late filing has been sought and obtained where applicant failed to apply timeously.
d) There is "good and sufficient cause" for the granting of the order.

"Good and sufficient cause" has been interpreted to mean that applicant must;

(i) Give a reasonable explanation for his default;

(ii) Prove that the application for rescission is *bona fide* and not made with the intention of merely delaying the successful party's enjoyment of the judgement.

To qualify for relief under Rule 449(1)(a) a litigant has to show that;

(i) The judgement was erroneously sought or errenously granted, and
(ii) The judgement was granted in the absence of the applicant or one of the parties and the rights of the absent party were affected by it.
(iii) That there is an ambiguity or a patent error or omission, or that the judgement was granted as a result of a mistake common to the parties, that needs correction or rescission.

To qualify for relief in terms of the High Court's Common Law power to rescind its own judgements, a litigant must show that.

(i) The court's discretion that it is being asked to exercise is broader than the requirements in both Rules 449 and 63, and;
(ii) Whether, having regard to all the circumstances of the case, including applicant's explanation for the default, it is a proper case for rescission.

The applicant *in casu* does not state on the application page, founding affidavit or draft order, under what rule or law the application is made. From the papers, particularly the heads of argument, it appears to me that the application is made under a mixture of Rule 63 and the Common Law Power of the court to rescind its own judgements. Such applications, where it is left to the court to surmise under what rule or law the application is made must be discouraged. The applicant must elect and be clear what rule or law he relies on.

THE LAW RELATING TO APPLICATIONS FOR RESCISSION OF JUDGEMENT

It is well settled law that an applicant seeking the rescission of a judgement granted in default must establish and satisfy the following important facts;

1) That the default was not willful. This would entail giving what could be regarded by the court as "good and sufficient cause" for the default. The court would

therefore consider, before coming to a final decision to grant or not to grant the rescission, the applicant's explanation for his default.

2) The applicant's prospects of success on his principal claim in the case of a plaintiff or alternatively, a *bona fide* defence in the case of a defendant.

My brother BERE J (as he then was), stated the following in *ZEDTC v Ruvinga* (1) 2012 (2) ZLR 61 (H)

> "In order to succeed in having an order made in default of appearance set aside, the applicant must show good and sufficient cause. The explanation tendered must negate any willful default. In the context of default judgement, "willful" connotes deliberateness in the sense that the applicant must have had full knowledge of the set down date and the risks attendant upon default; and yet freely took the decision to refrain from appearing, whatever the motivation of that decision may have been."

In the ZETDC case, the applicant had desired a postponement in a matter wherein the issues raised were *res novae*. Counsel was convinced that the postponement would certainly be granted. He decided not to attend court and sent a junior legal practitioner who then bundled. The Judge had no kind words as he held;

> "There is nothing like an automatic post-ponement when a matter is set down before a Judge. A party desiring a post-ponement must advance cogent reasons for post-ponement and seek the court's indulgence in that regard. Only when ……. would the court accede to such application. It was certainly not enough for the applicant's legal practitioner to decide not to attend court on a date that he had agreed to, and delegate his junior to handle the desired post-ponement."

In *Songore v Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (SC) MCNALLY JA (as he then was) had the following to say regarding prospects of success or *bona fide* defence in applications for rescission of default judgement.

> "The applicant must show that he has a *bona fide* defence, it being sufficient if he sets out averments, which if established at the trial, would entitle him to the relief asked for. He need not deal with the merits that the probabilities are actually in his favour."

The learned Judge further held that;

> "A defendant who admits that he was negligent in his tardiness may nonetheless be granted rescission if he shows *bona fides*; Indeed the court might be unjustified in condemning him for a very short delay, although his explanation for it is inadequate, if defendant where found to be acting *bona fide* and had a *prima facie* defence."

See also

(i) *Mereki v Forrester Est (Pvt) Ltd* 2010 (1) ZLR 351 (H) per MAKONI J

(ii) *Zimbabwe Banking Corporation v* Masendeke 1995 (2) ZLR 400 (S)

(iii) *Mushosho v Mudimu & Another* 2013 (2) ZLR 642

Also in *Uzande v Katsande* 1988 (2) ZLR 47 (H) wherein REYWOLDS J held that there should ordinarily be a two (2) pronged approach or enquiry into the issue of "good and sufficient" cause. He held that;

> "An allegation by a litigant that he was unaware of a pending trial would justify restitutio only if he could establish "a supremely just cause of ignorance free from all blame whatsoever." (section 2.4.14). The first hurdle is to show that *prima facie*, he was blameless. In the present case, his allegations, if true, would establish a supremely just cause of his ignorance." The second hurdle is to establish, on the balance of probabilities, the truth of his allegations."

Unfortunately, in the Uzande case above, the applicant failed on the 2nd hurdle to show on a balance of probabilities that he was genuinely unaware of the date of hearing because of incorrect information supplied by his legal practitioners. Infact also in *ZEDTC v Ruvinga* (supra), in its application and explaining the non appearance, applicant relied on an affidavit of its legal practitioner one Vote Muza. Although the court held that he was entitled to depose to the said affidavit in support of the application the Judge held that it discredited the *bona fides* of the explanation for the default. Whereas Mr Muza had stoutly tried to convince the court in his founding affidavit that the reason for the default was that his client's representative was held up by professional examinations, his colleague, the junior that he had sent to court, a Mr Tawona was singing a different song advising the Judge that the representative was attending a course in Kadoma. In another, also similar to the current application, in explaining the default, the applicant claimed that he had not attended court because his erstwhile legal practitioner, who had renounced agency a few days before the set down date had sent him an email with a wrong date. He was thus unaware of the date. Unfortunately, the erstwhile legal practitioner could not confirm that explanation as it was apparently false.

The Law Relating to "Right of First Refusal" also known as "A Right of Pre-emption" *Vis* Prospects of Success

In *Prize Commercial Holdings (Pvt) Ltd v Goldberg* & Ors 2012 (2) ZLR 452 (HH 446 – 12) it was held, per MATHONSI J, (as he then was) quoting MALABA JA, that;

> "a right of pre-emption, also known as a right of first refusal, can only be created by contract or agreement between the grantor and the grantee. Where breach of the right is alleged as a cause of action and its existence is denied, the onus is on the plaintiff to show that there was an agreement between the parties in terms of which the defendant undertook to offer him the property at a price equal to that offered by another."

It was held further that a right of first refusal (pre-emption) differs from an option giving the holder the right to buy in priority to other prospective buyers if, and when the seller decides to sell. It was also held in the case of a leased property that a right of first refusal can only be granted by the property owner and by agreement of the parties. In Zimbabwe, there is no custom, convention or practice under which a plaintiff can claim the right of first refusal (pre-emption) as a sitting tenant on a property to be sold.

The learned Judge also went on to quote again with approval MALABA JA (as he then was) in *Central African Processed Exports (Pvt) Ltd and Others v MacDonald and Others* 2002 (1) ZLR 399 at 403 and 404 A that;

> "No right of first refusal was granted to Central African by the owner of the property in any of the numerous written leases the parties entered into. I am prepared, in the circumstances of this case to accept that the letter from Roz Baker to Mr Gullan dated 6 November 1996 granted him a right of first refusal and an offer to exercise that right. Mr. Gullan exercised the right by refusing to purchase the property at the price of $1.6 million which the seller was prepared to accept from a third person. The offer of first refusal could not remain open after it had been refused."

Indeed it appears to me from decided authorities, and it is only logical anyway, that the offer of first refusal is only open when the grantee offers to purchase the property at a price acceptable to and in fact accepted by the seller. It cannot be the other way round where the purchaser or tenant of a property chooses to make his offer and expects or demands that the seller should accept it. A fortiori, it cannot be, as appears in Annexture "K" of applicant's papers that a right of first refusal would exist or be contemplated in a situation wherein the tenant, perhaps after hearing that the owner of the property is selling it, writes a letter to buy the house, giving a value himself, making deductions of what he terms depreciation in value

in two (2) years, and a quotation of repairs that he claims he made to the property, and thereafter offers to buy the property for $40 000-00 on a "rent to buy"basis. Thereafter he gives a payment plan running into up to five (5) years without taking into account or factoring in interest, rate of inflation or changes in monetary policies etc.

The letter written on 26 February 2014 and unsigned reads as follows;

Mr. A Jonas
13 Nisbert Drive
Redcliff

26th February 2014

Mr. D Sailesi
718 April Close
Hintonville, Chegutu

Dear Sir,

Re: Offer to buy house – 13 Nisbert Drive, Redcliff

Following our discussion over purchase of the afore mentioned property, and I being a sitting tenant, hereby make a proposal and to avail myself of an offer to buy upon the following terms for consideration:-

(1) While the house was valued at US$45000 in 2012, and considering the deterioration thereafter, and a quotation of US$4500 for repairs, I willfully offer the sum of US$40000 payable as follows;-
(a) Deposit of US$10000;
(b) Monthly installments of US$2500 per month for 12 months; or
(c) Monthly installments of US$1250 per month for 2 years; or
(d) Rent to buy at US$600 per month for next five years.

Wherefore, I should be glad to hear from you by return, if this proposal is acceptable to you.

I hope and trust you will give this proposal your kind consideration.

Thanking you in advance,

Yours Sincerely,

A. Jonas

In my view, such an offer clearly was unlikely to have been accepted. It is no offer at all. Needless to say, it would not be surprising if it was not even responded to, as he claims. However, 1st respondent argues that even assuming that applicant had the right of first refusal, applicant's own offered price in the letter, without even consulting and finding out the property owner's price, plus installments ranging from 1 to 5 years was rejected and this was communicated to the applicant. 1st respondent further avers that there was absolutely no reason for him to have accepted a lesser amount of $34 000-00 if applicant had reasonably offered to pay $40 000-00. In contrast, 2nd respondent went and inspected the house in the presence of applicant's wife, accepted to pay $34 000, which it then paid in full and took transfer of the title.

I am cognissant of the fact that applicant now wants to rely on the letter simply dated 14 February and titled:-

"Re-assistance rendered" as the letter that gave him the "right of first refusal." I noted the following;

a) The letter is not properly dated and is in relation to "assistance rendered."
b) It refers to first prefence to buy the property, not right of first refusal. As shown in Price Commercial Holdings (supra), first preference is different from a right of first refusal, and has its own requirements slightly different from those of the right of first refusal.
c) That letter, which has just two (2) small paragraphs states in the last paragraph that the property was yet to be put on the market, but it could be sold to him if he "came up with a reasonable" and "acceptable" offer.

So the applicant was not as it were given a "blank cheque" to dictate as he wishes as he does in his letter of 26 February 2014.

It appears to me therefore that applicant does not know whether he was granted a right of first refusal (pre-emption) or simply a first preference also known as a right to buy in priority to other prospective buyers. It appears also that applicant has not claimed that he responded to the letter accepting the offer of 14 February if he took it to be an offer.

In any event, I find it quite strange and undesirable that such a seemingly complex and multi-faceted agreement claimed by the applicant, would be entered into in a shoddy manner which even the applicant himself cannot easily, and properly explain. There usually should be a written agreement showing clearly the terms thereof especially the alleged right of first refusal. I am inclined to accept that there was no such agreement. I am fortified in my finding by the court's reasoning in Price Commercial Holdings (supra) where it pointed out thus;

> "The plaintiff has sought to argue that the right of pre-emption (first refusal) was given to it by correspondence. I have already stated that its letter of July of 29 2003 and the response from the 3rd defendant did not create a contract between the parties. In considering the existence or otherwise of a contract of pre-emption, the basic rules of offer and acceptance apply. It cannot be said that these existed especially as the 3rd defendant made it clear that the property was not for sale and that it would notify the plaintiff if the house was put to the market. No intention to create a right of pre-emption can be imputed on the 3rd defendant by virtue of the wording of its letter of 31 January 2003."

And also in *Madan v Macedo Heirs &* Anor 1991 (1) ZLR 295 (SC) per GUBBAY CJ (as he then was) where he held that;

> "The summarization of what transpired between the parties prior to the date on which transfer of the property was offered leaves me in no doubt that the appellant failed to show that the 2nd respondent knew him to be the holder of a valid and current right of pre-imption. I would go further and say that I am satisfied that the second respondent positively proved it entertained a *bona fide* and reasonable belief that the right offered in the letter of 21 October 1981 had never been accepted and that Gabriel and Mrs Macedo were wrong in thinking that acceptance in some form or other was unnecessary to bring the right into existence. As petinently stressed by Deary in his opposing affidavit;
>
> "The letter did not seem to me to be enough to establish that the applicant had a right of first refusal."

In casu, the letter dated simply 14 February was not responded to by the applicant. If it were to be taken as an offer for a right of pre-imption, there was no acceptance and there was no contract. Similarly, the applicant's own letter of 26 February 2014 makes no reference at all to the letter of 14 February and is premised on the mistaken belief as shown elsewhere in this judgement that a sitting tenant has, as a matter of custom, practice or law, a right of first refusal. Whether the apparently unreasonable offer to buy the house on a "rent

to buy basis" was not responded to or was rejected, makes no difference. Either way, there was no offer and acceptance, and so there was no contract.

It clearly appears to me also, that applicant has no prospects of success even on the merits. I am inclined to agree with the respondents that applicant is merely buying time. He was not prosecuting his matter as he now claims in his application but sat on it until the respondents set it down for trial themselves on 13 March 2018. He defaulted and was only erked by imminent eviction after 2nd respondent had paid in full the purchase price and transfer of title was effected. I am also convinced that the applicant is simply motivated by the continued stay in the house without paying rent, rates and utility charges. As at 30 July 2016 per MOYO J's order, "he owed $8 750-00 in rent arrears only. That amount may well be more than trebled now considering interest and rates as well as the fact that there has been an additional four (4) years.

Finally, I must say that the fact that KAMOCHA J dismissed an application which then proceeded by way of action procedure is no reason to argue that the applicant therefore has prospects of success at trial. Equally so, the fact that MAKONESE J granted consolidation and held a Pre-Trial Conference is surely no justification at all to argue that the claims by applicant therefore are merited. In both cases, the two Judges would not have been obliged to, and would certainly not enquire into the merits or prospects of success of applicant's claims.

The law is clear and well known. There are instances where the prospects of success and the merits are entertained. These are such instances as applications for condonation of late filing of rescission of judgement, review or notice of appeal, as well as hearings themselves of rescission of judgement. Applicant sought to mislead the court with some bizarre argument.

It is this court's finding that there being no just cause and no prospects of success on the merits, there must be finality to litigation. Innocent purchasers in such cases cannot be kept in limbo perpetually having paid in full for the property and taken transfer of ownership of the same as applicant keeps on thinking of any argument to go back to court.

See (i) *Roy Harvey v Eyebuth Properties* – H-H 249-15

(iii) *Machaya v Muyambi* SC 4/05

Accordingly, the application is dismissed with costs of suit.

Mavhiringidze & Mashanyare c/o Mashayamombe & Company, applicant's legal practitioners
Messrs Wilmot & Bennet c/o Danziger & Partners, 1st and 2nd respondents' legal practitioners