EVOLUTION GROUP LIMITED
versus
PAN AFRICAN BUILDING SOCIETY

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE,16 September & 24 November 2021

Opposed Court Application

MUZOFA J: This is an application for rescission of a judgment issued under HC 9471/19.

The applicant is a dully incorporated company in terms of the laws of Zimbabwe. The respondent is an incorporated company registered in Zambia. It is under liquidation.

The parties are embroiled in a dispute which was finally determined in the High Court of Zambia. In terms of the order, the applicant was ordered to pay US $150.000.00 plus interest at 3-month Libor plus 7% per annum. To enforce the foreign judgment, the respondent filed a chamber application for the registration of the order in this court.

The application was granted. A writ was issued out. The applicant was jostled into action when it was served with the notice of execution. An application for stay of execution was immediately filed under HC 2085/21 together with this application for the rescission of the default order and costs were sought against both the respondent and the legal practitioners.

When the respondent's legal practitioners were served with the notice of set down for hearing, they filed a notice of renunciation. Applicant's legal practitioners wrote to the respondent's legal practitioners advising that it is in their best interest to appear on the date of hearing to make submissions on costs. Indeed, there was appearance for the respondent although Mr *Zhuwarara* indicated that he was appearing to make submissions on costs and had no instructions on the main matter.

On the date of hearing, a preliminary point was taken by the applicant that the notice of renunciation was invalid, no reasonable time was given since it was filed after receipt of the notice of set down and the last known address provided was defective. The point taken was opposed. It was submitted that the agency relationship was properly terminated in terms of r9 (5) of the High Court Rules, 1971. A concession was made that the address could have been clearer but that did not render the termination defective.

I upheld the objection; the notice of renunciation is invalid. Respondent's legal practitioners accepted service on behalf of the respondent. It is on that date that it renounced agency effectively giving a two weeks' notice. The notice of renunciation provides the respondent's address as Pan African Building Society, Cairo, Road, Lusaka, Zambia.

Rule 9 (5), envisages that a reasonable time is given. The requirement to give reasonable time where a notice of renunciation is served is for the purposes of management of court cases. There must be enough time to properly serve the litigant at the given address. The importance of reasonable time cannot be overemphasised especially where it is given after the matter has been set down. What constitutes reasonable time depends on the circumstances of each case. In casu the last known address is in Zambia. The address given is just a road and has no number. In my view the two weeks' notice would be unreasonable considering the process of service outside the court's jurisdiction.

Having upheld the preliminary point, *Mr Zhuwarara* requested for the matter to be stood down to enable him to get instructions. The matter was stood down. When the hearing resumed, a point *in limine* was taken for the respondent that the application is defective as it did not state the rule under which it is made. In addition it was argued that the application was filed out of time. The default order was granted in December 2019 and the application was filed in May 2021 some eighteen months after the order was granted. No reasonable explanation was given for the delay. On the authority of *Grantully Investments* v *UDC Ltd* 2000 (1) ZLR 361 (SC) the court was urged to dismiss the case

Although Mr *Nyeperai* for the applicant tried to downplay the shoddily prepared application by submitting that the application was made in terms of both r63 and r449 of the Rules the pleadings filed do not confirm the submission. The face of the application does not state in terms of which rule the application is made. There is only a reference to r449 somewhere in the founding affidavit. At the end of his submission, condonation was sought for the inelegant way of drafting pleadings. In the absence of any prejudice to the respondent since all the relevant facts were traversed in the founding affidavit, there is no reason to withhold condonation.

Indeed, where an application for condonation is filed after an unreasonably long period and there is no reasonable explanation the application maybe susceptible to dismissal on that basis alone. This is so because r449 is meant to expeditiously correct an obviously wrong judgment. In the *Grantully* case (*supra*) the application was filed after five years six months, such period was found to be unreasonable. A flagrant breach of the rules can result in a

dismissal of the application despite the merits of the case. See *Viking Woodwork (Pvt) Ltd* v *Blue Bells Enterprises (Pvt) (Ltd)* 1998 (2) ZLR 249 (SC).

The point taken cannot succeed. An application made in terms of r63 must be filed within a month after the litigant has had knowledge of the order. On the other hand an application made in terms of r449 must be made within a reasonable time. What constitutes reasonable time depends on the circumstances of each case. I accept that the applicant became aware of the default judgment in April 2021 when the respondent attempted to execute the judgment. I say this because the applicant filed a notice of opposition albeit belatedly since the default judgment had been issued. I accept that the applicant, with some diligence could have known earlier of the default judgment since it was aware of the application, but parties were engaging. My acceptance of the date when the applicant became aware of the default order means the application that was filed in May 2021 was therefore filed within the prescribed period of one month and it is also a reasonable time for the purposes of r449.

On its part the applicant took an additional two points *in limine* that there is no valid opposition and that the party that filed the chamber application had no *locus standi in judicio* .

In respect of the founding affidavit, it was submitted that it is unclear if indeed it is the respondent's liquidation manager. In this case he identified himself as Maibibiba Malala yet under HC 9471/18 he is identified as Maibiba Mulala. In addition, the court was urged to strike out the opposing affidavit as it was fraudulently made. I was referred to some pages whose ink and print are different from the rest of the document. It was submitted that the deponent's signature was not original. The suggestion is that the opposing affidavit might have been made in different stages and was not made by the deponent. He could have just sent the last part with the signature.

In opposing the points taken, it was submitted that different names must not be taken to refer to different people. It was just a typographical error. I accept that submission, nothing turns on the point taken because the deponent was appointed as the liquidation manager of the respondent. His proper name can easily be verified. Despite that submission, the court was not advised which of the two names properly identified the deponent. I find no merit in the issues raised in respect of the opposing affidavit. Infact the allegation of fraud is a serious imputation. Legal practitioners must exercise restraint in making such serious allegations against an officer of the court in the absence of tangible evidence. There was no expert evidence to support the alleged machinations identified by the applicant's legal practitioner. I dismiss the preliminary point taken.

The second point *in limine* has no merit too. In *Allied Bank Ltd v Dengu &Anor* 2016 (20 ZLR 373 (SC) although the court considered the issue whether a company placed under liquidation after *litis contestatio* loses its *locus standi*. I find the case instructive in this matter wherein the court noted that *locus standi* is a matter of law. It is not lost as a result of change of status, since the real and substantial interest remains. The issue then is not whether the respondent has *locus standi*, the issue is whether it can exercise its *locus standi* without the leave of the court. The issue of *locus standi* does not arise in the circumstances of this case.

I address the merits of the case. The applicant's case is that the respondent filed the chamber application and served the legal practitioners of record. At the time of service, they had no instructions to accept service. The respondent was represented by a law firm practising under the name *Lunga Attorneys*. The erstwhile legal practitioners did not effect proper service. It is unclear at what stage the applicant's legal practitioners eventually got involved in the case since they had declined service. However, when they eventually accepted service they engaged the respondent's legal practitioners particularly advising that before issuing process the respondent being a foreign company was required to pay the applicant's security for costs. While parties were engaging the respondent obtained the default judgment. I must comment that the engagement must not have detracted the applicant from filing its response. The respondent did not serve the applicant with the order. The applicant set out the factors that it believed had the court known it would not have granted the application.

In opposing the application, the respondent skirted around the issues raised by the applicant, it traversed the periphery which did not take its case any further. Its main thrust was that there was an extant order that the applicant had failed to satisfy, and it was within the respondent' right to file such a chamber application. The respondent did not specifically address the issues raised by the applicant that it failed to disclose information to the court.

For an applicant to succeed in such an application under r449, it must show that the order was granted in its absence and it may place facts before the court to show that, had the court known it would not have granted the order. See *Munyimi* v *Tauro* 2013 (2) ZLR 291 (SC). The facts that the applicant must place before the court are the basis for the alleged errors leading to the granting of the order.

In this case the respondent did not disclose certain information that, had the court known it would not have granted the default order. I shall not relate to the issue of service because my view is that the applicant also contributed to their problems by insisting on security

for costs instead of filing a response. The issue of service pales in light of the uncontroverted fact that there was a deliberate non-disclosure of pertinent facts in this case.

The first non-disclosure was that the respondent was under liquidation. A legal practitioner by the name *Kingstone Musaila* '*Kingstone*' practising in Zambia deposed to the founding affidavit. He stated that he was involved in the litigation between the parties in terms of which an order was granted against the applicant. The founding affidavit in HC 9471/19 was sworn to on 12 November 2019. He did not disclose to the court that on 17 October 2019 the respondent was placed under compulsory liquidation by the Bank of Zambia. Obviously, such placement would have implications on all litigation by the respondent. The act of placement under liquidation stripped the respondent of its right to sue in its name.

Secondly, *Kingstone* did not disclose to the court that no liquidation manager had been appointed to manage the affairs of the respondent. The liquidation manager was only appointed on 19 December 2019. The application under HC 9471/19 was filed on 20 November 2019.To demonstrate the anomaly in the chamber application, in the application for stay of execution filed by the applicant, it is the liquidation manager who swore to the opposing affidavit and not Kingstone. As such *Kingstone* had no authority to depose to the founding on behalf of the respondent.

The two non-disclosures are fatal that this order must be granted without considering further factors raised by the applicant. It also becomes unnecessary to consider the r63 application.

Although in a letter dated 15 September 2021 the applicant's legal practitioners advised that at the hearing, they will seek an amendment to the order. The application was not made however the draft order filed of record sought costs against the respondent and its legal practitioners jointly and severally the one paying the other to be absolved. At the end of his submissions Mr *Nyeperayi* climbed down and advised the court they no longer seek costs against the respondent's legal practitioners.

Costs always follow the cause. Punitive costs are granted in exceptional cases. In this case the request for punitive costs is based on the respondent's intransigent attitude. According to the a0p0plicant, the chamber application was unnecessarily filed since the judgment debt was had been satisfied. The money was deposited with the respondent's legal practitioners. I agree with the sentiments. I must add that the extent of the non-disclosure under HC 9471/91 was an attempt to snatch at a judgment. The court must signal its displeasure at such conduct by way of an appropriate order of costs on a punitive scale.

Accordingly, the following order is made.

1. The application be and is hereby granted with costs on a legal practitioner client scale.
2. The default order granted under HC9471/19 on 19 December 2019 be and is hereby set aside

Costa & Madzonga, applicant's legal practitioners
Madzima Chidyausiku Museta Legal Practitioners, respondent's legal practitioners