REDAN GAS (PRIVATE) LIMITED
versus
BYRON TENDAI MASHORA

HIGH COURT OF ZIMBABWE
BACHI-MZAWAZI J
HARARE, 13 September, 05 & 12 October 2022

Opposed Application

Mr *T B Kativhu*, for the applicant
Mr *K Mutyasira*, for the respondent

BACHI-MZAWAZI J: This is a doubled barreled application for condonation for the late filing of an application for rescission of judgment as well as the actual application for rescission of the default judgment in question. Inevitably, the outcome of the first determines whether the second will proceed or not. Both applications are opposed. I dismissed both *ex-tempore* and these are the reasons following the request by the applicants. The application is best appreciated within the context of its brief factual background. The summarized narrative is that applicants, a duly incorporated Company, in the fuel business entered into a fuel deal with the respondent. The terms of the business arrangements between the parties are not disputed. However, it is common cause that the parties had a fall out resulting in the respondent issuing summons against the applicant in case HC 6797/20 on 1 November 2020. That being the case,

On 15 April, 2021, respondent obtained a default judgment arising out of an acknowledgement of debt from the applicant.

Applicant's goods were attached on 30 April, 2021 pursuant, to the default judgment and the attendant court processes. The attached goods where sold on 21 May 2021 and 12 June 2021. All the above took place after the lapse of the thirty day period upon which the applicant was free to apply for the rescission of the default judgment.

It follows that, another attachment was caused by the respondent, on applicant's goods, on 29 October 2021 for the recovery of $20 000 United States Dollars. The initial judgment debt was

for $22 000USD. The reason advanced by respondents is that the first sale in execution did not realize enough to satisfy the judgment debt.

It is this second attachment that has led to the present application for the condonation for the late application for rescission of judgment in the main matter and the rescission of that default judgment.

The applications are premised on two main grounds. Firstly, that applicant had believed that the first attachment in execution satisfied the whole debt due. Secondly, applicants motivate that the reason for the default was caused by their then legal representatives. As such they were not in wilful default.

In that regard they argue that although the delay in taking the requisite action is long, it is not inordinate. The y also contend that their above explanations of why they did not act timeously is reasonable as they were not in wilful default. In addition they contend that there are reasonable prospects of success in their applications for rescission of judgment.

They cited several cases to support their averments, amongst them *Forestry Commission* v *Moyo* 1997 (1) ZLR 254 (S)

On the other hand the respondents submit that both applications lack merit and must be dismissed. They argue that it is not in dispute that there has been a delay of six months after the lapse of the period upon which applications for rescission of judgment are made. They contend further, that the six months period is inordinate. In addition they challenge the authenticity of the applicant's move to have the default judgment rescinded, when they did not contest the attachment, removal and sale of the goods that had been attached pursuant to that default judgment. In their view the outcry, is only as a result of the second attachment. They therefore posit that there was never an intention to rescind the default judgment in the first place. Against, that background, it is the respondent's argument that the delay was inordinate. They further opine that explanation given for the delay is unsatisfactory and there was wilful default in that the default of the legal practitioners of applicant's choice cannot exonerate the applicant. They state that there is nothing on record indicating actions taken by the applicant against the flagrant legal practitioners. Respondents also cited a plethora of supporting cases including; *Simon Musanhu* v *Mari Nyoni &Anor* SC 134/04, *Elias Mabeka* v *Hild Mabeka* SC 19/03, amongst others

Faced with the above facts and submissions the issue emerging therefrom is whether or not the applicant has satisfied the requirement of both the application for condonation for the late filing of an application for rescission and of the default judgment in question?

In order to do that, an appreciation or overview of the laws governing both applications is necessary. Apparently, the some of the requirements for an application for condonation enter twine with those of an application for rescission of judgment. I will proceed to deal with the composite requirements and then those peculiar to each application at the necessary stages.

In the case of *Bwititi* v *Stanley Farms (Pvt) Ltd and 20 Ors* SC 112/21 MWAYERA J summarized the facts that are to be considered in an application for condonation for late compliance of the rules of the court as follows:

a) The extent / degree of the delay
b) The reasonableness of the explanation of the delay
c) The prospects of success
d) The interest of the administration of justice

The essential elements have been laid out in varied form in several case authorities, amongst them, K *M Actions (Private) Limited* v *Adenanyasha Samuel & Anor* SC 115/12, *Maheya* v *Independent African Church SC 58:07 National Social Security Authority* v *Denford Chipunza* SC 16/04. In most of the cases they are considered cumulatively

In applying the law to the facts of this case the starting point is that of the delay.

a) <u>The delay and its extent/ Explanation for delay</u>

It is a common fact, that the delay is six months. The respondents motivate the point that a delay of six months is inordinate whilst the applicants state that given the circumstances of their case six months is not an inordinate delay.

On analysis, it is not contested that the period upon which to file an application for rescission of judgment is 30 days. The applicants were sixty days out of time.

In the case of *Simon Musanhu* v *Mari Nyoni & Anor* SC 134/04, a delay of a month, coupled with the explanation given was considered inordinate by the Appellate Court. In the present case I will not consider the extent of the delay, in isolation but in conjunction with the reasons for the delay.

It is evident that there was an acknowledgment of debt which by its mere existence entitles a default judgment. Applicant is not challenging its indebtedness, the judgment debt or the acknowledgment of debt. It thus apparent that they did not contest the default judgment for those reasons. What is clear from the record is that they did not even contest the writ of execution the attachment and the subsequent sale in execution by the Sheriff. Nothing on record shows that they were unaware of all the court process after the default judgment. This inescapably leads to the conclusion that their inaction sanctioned the outcome of the default judgment and the attendant process. It is illogical for them to then try to bring in the issue that their legal practitioner did not act on their instructions to rescind. Surely, if they are to be believed on that note what about the ensuing execution processes they did not challenge. They did admit that had it not been for the second attachment process they would have been contend with the default judgment and the first attachment and sale in execution.

The mere admission makes their explanation for the delay suspect and unreasonable hence unsustainable. In the case *Takunda Lawrence Madamombe* v *The State* SC 117/21. It was emphasized that there must be a reasonable and acceptable explanation for failure to comply with the rules of the court. I find the applicants explanation falling short of being reasonable under be circumstances,

b) <u>Prospects of success/wilful default</u>

On the third essential element, an assessment of the applicant's argument seems to rely heavily on the prospects of success of their application for rescission. Applicant's addressed this ground in conjunction with that of wilful default.

They argue that the delay was occasioned by their legal practitioners and they are not to suffer because of the sins of their legal practitioner. In the same vein, they posit that they were not in wilful default as their legal practioner acted contrary to their instructions. Their prospects of success, so they argue are hinged on the point that they do have a valid defence. Their valid defence from the papers is that, the first attachment and sale in execution satisfied the debt.

I find this not to be a valid defence to rescind a default judgment granted on the basis of an acknowledgment of debt. As stated earlier own, the judgment debt nor the acknowledgment of debt have not been challenged.

Nothing has been placed before the court to demonstrate how much was realized on the first sale? How much is outstanding to be satisfied by a second attachment? Both parties fell short of putting the court in their confidence and produce this essential crucial piece of evidence.

Nevertheless, the law is clear on the fact that he who avers must proove. The *onus* was on the applicant to furnish the court with that information in the absence of such evidence coupled with all the other factors examined here in, I find no prospects of success in the application for rescission itself.

In the case of *Kereke* v *Maramwidze & Anor* SC 86/21, citing the case of *Chikurumhe* v *Zimbabwe Financial Holdings* SC 10/18, it was noted that the overriding factor in applications for condonation is the prospect of success.

It is my view that there are no such prospects of success in this application for condonation as well as that of rescission. Further the importance of the case on a balance of probabilities has been illustrated by the proactivity of the respondent in pursuing the recovery of their debt as opposed to the reactivity to actions put in motion, evinced by the applicants. The respondents have succeeded in demonstrating that the applicant was in wilful default, has no *bona-fide* defence and no prospects of success. A litigant who consciously exercises his constitutional right of selecting a legal practitioner of his choice cannot be exonerated from their actions, inactions or omissions. Moreso, when litigants have a duty to make follow ups on their cases and report errant legal practitioners to their regulatory authorities.

See *Selk Enterprises (Private) Limited* v *Hurungwe & Anor* SC 10/03.

In *Saloofee & Anor* v *Minister of Community Development* 1965 (2) SA 135 at 141 C. It was highlighted that;

> "There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation. To hold otherwise might have a disastrous non-observance of the rules of this court."

c) <u>Administration of justice and importance of the case.</u>

In a nutshell, as already analyzed there are no prospects of success in that the applicants are not denying liability, nor did they place evidence to show that the first sale in execution did not satisfy the judgment debt nor that the second attachment and sale in execution was not justified. It is in the interest of the administration of justice that matters are brought to

finality. The respondents have ceaselessly illustrated the importance of the matter by taking the lead in litigation. As has already extrapolated, applicant has illustrated that he only waits to counter action initiated by the respondent. Nothing turns on the issue of *locus standi* which was not canvassed any further by both parties.

Accordingly, the application is dismissed with costs.

Dube Manikai Hwacha, applicant's legal practitioners
Messrs Mubangwa and Partners, respondent's legal practitioners