PATHACRES (PRIVATE) LIMITED
versus
TIMOTHY TENDAI MYAMBO

HIGH COURT OF ZIMBABWE
MUZENDA J
MUTARE, 6 and 9 June 2022

M. Hogwe, for the applicant
Advocate M. Ndlovu, for the respondent

MUZENDA J: On 11 August 2021 parties appeared before me under case number HC 144/21 and by consent the matter was postponed to 13 September 2021. On 13 September 2021 the application was by consent struck off the roll of opposed matters. Parties agreed that case number HC 26/20 be consolidated with case number HC 144/21. Under case HC 26/20 Pathacres (Private) Limited was the applicant seeking the following relief:

"**It is Ordered that**

1. **The judgment granted by this Honourable Court on the 22nd of January 2019 under case HC 209/18 be and is hereby set aside.**
2. **The respondent to pay costs on a higher scale if the application is opposed.**"

The respondent under case number HC 26/20, Timothy Tendai Myambo, opposed the application for rescission of judgment and filed his opposing papers. After filing the opposing papers he found some information which he believed could buttress his notice of opposition, so on 24 March 2020 respondent filed an additional affidavit in terms of Order 32 r 235 of the High Court Rules, 1971 under case number HC 144/21 seeking the following:

"**It is Ordered that:**

1. **Applicant be and is hereby granted leave to file an additional affidavit within 10 days from the date of this order.**
2. **Respondent shall pay costs of suit.**"

It was then unanimously agreed that it was prudent for both records to be consolidated. After consolidation of both records the matter was rescheduled for 16 May 2022 for argument.

On 9 May 2022, the respondent under HC 26/20 Mr T.T. Myambo delivered a letter dated 3 May 2022 addressed to the Chief Justice of the Republic of Zimbabwe copied to the President's Office, Zimbabwe Anti-Corruption Commission, Registrar of the High Court-Mutare, Senior Judge at Mutare and Secretary of the Judicial Service Commission, asking for

my recusal from the matter. The respondent's legal practitioner Mr Tabana was asked to make a formal application on the date of hearing. He then liaised with applicant's legal practitioner Mr *M. Hogwe* to defer the matter for a period of 3 weeks for him to reconsider the recusal request. Matter was then postponed to 6 June 2022 for hearing.

On 6 June 2022, respondent's legal practitioner *Advocate Ndlovu* withdrew the request for recusal and indicated that the 3 May 2022 letter by the respondent was not called for, he added that he was happy with the court proceeding to preside over the application. I then proceeded to hear the application. *Advocate Ndlovu* went on to withdraw case number HC 144/21 where respondent was seeking leave of the court to file an additional affidavit. What then remained was case number HC 26/20 for the rescission of judgment.

Background

On 22 January 2019 under case number **HC 209/18**, respondent obtained a default judgment in his favour where it was ordered as follows:

"*1. The agreement(s) of Sale between the parties valid and binding.*
2. Defendant is interdicted from selling Lots 18, 19, 20, 21 and 28 of the remaining extent of the Willows of Clare Estate Ranch to any other persons.
3. Lots 18, 19, 20, 21 and 28 of the remaining extent of the Willows of Clare Estate Ranch are the lawful property of the plaintiff.
4. Defendant shall take all the necessary steps to pass transfer of the mentioned Lots to the plaintiff within thirty days of this order, failing which the Sheriff of the High Court be and is hereby authorized to effect transfer to plaintiff and sign all the relevant papers.
5. Defendant shall be liable for any and all costs incurred by the Sheriff of the High Court in enforcing this order.
6. *Defendant shall pay costs of suit*."

Having obtained this order, respondent decided to sue applicant further under case number **HC 270/19** seeking a *declaratur* to the following effect:

"*(a) An order declaring the agreement between the parties to be valid and binding.*
(b) An order interdicting the defendant from selling Lots 22 and 38 to any other person.
(c) An order declaring Lots 22 and 38 to be the lawful property of the plaintiff."

And transfer to respondent among other things.

The summons is dated 19 October 2019. The summons was served on applicant on 11 October 2019. Applicant in its founding affidavit for the application for rescission contends that it became aware of the default judgment granted on 22 January 2019 only on 16 January 2020 and its directors resolved to apply for rescission of judgment on 17 January 2020 and she proceeded to file the application for the rescission of judgment. Applicant's sole reason for

default is that the summons under case number HC 209/18 were served at Number 303 Lister House, Jason Moyo Avenue, Harare which was an address used by the applicant's agents who had been tasked by applicant to prepare and file with the Registrar of Companies annual returns. Hence to applicant there was no personal service nor proper service and the return of service clearly showed that the summons was served by affixing at the door of the address. Applicant denies being in willful default.

On the aspect of the defence to respondent's claim, applicant denies selling the plots to the respondent at all. Respondent contracted with Takawira Zembe, applicant's shareholder and respondent only paid US$15 000 for a 6 hectare piece of land. Applicant sees no basis for an order compelling it to transfer ownership to the respondent. Applicant adds that no subdivision permit exists, no certificate of No Present Interest issued by the government exists and there are no approved diagrams accompanying the transfer of the plots in question. To the applicant, it believes that it has a good defence to the respondent's claim.

In opposing the application, the respondent raised points *in limine*. The respondent contends that the application for rescission of default judgment is out of time. Applicant did not abide by r 63 of the old High Court Rules. In respondent's view, applicant became aware of the judgment on 11 October 2019 when summons under case number HC 270/19 were served on Takawira Zembe. Respondent also submitted that the extract of applicant's resolution filed of record shows that applicant's shareholders or directors became aware of the default judgment on 17 November 2020 and not 16 January 2020 as alleged by the applicant in its papers. In any case respondent believes that applicant's papers are replete with lies on the aspect of the date it became aware of the existence of a default judgment and the entire application for rescission must be dismissed.

On the merits respondent argued that applicant has failed to meet the requirements of an application for rescission of default judgment. The application is belated and there is no application for condonation for late application. There is no good and sufficient cause for the granting of the order. In addition to all these factors, applicant has no *bona fide* defence to the respondent's claims. Applicant entered into a valid contract of sale with respondent and respondent purchased all the various plots and applicant must transfer ownership to the respondent hence there are no prospects of success on applicant's part. On the main matter on p 95 of the record, respondent added that the default judgment was justified in the circumstances of the matter but however conceded that rescission of such a default judgment

is upon the discretion of the court taking into consideration the requirements as set out in the rules.

The following are issued for determination:

(a) Whether the preliminary points raised by the respondent have merit?

(b) Whether applicant has managed to establish adequate grounds for rescission of a judgment granted in default?

Respondent is convinced that the application for rescission of judgment is out of time. It is presumed that applicant should have known about the judgment two days after it had been granted. In addition, the respondent calculating his dates from 11 October 2019 came up with 4 months (or 120 days) to the date when the application was made. Applicant states that it became aware of the default judgment on 16 January 2020 and immediately instructed its legal practitioners to apply for rescission, the date 17 November 2020 on the extract of the resolution found on p 45 of the record was typographical error, it must read 17 January 2020 the date the Secretary of applicant signed it. A lot of adverse inferences were made from the extract but in my view I am satisfied that indeed that extract contains a typographical error on dates otherwise it was signed well before the resolution came into existence. The date 16 January 2020 being the crucial date when applicant became aware of the default judgment was not strongly refuted by the respondent. Otherwise why would applicant choose to defend the matter under HC 270/19? The application for rescission was stamped by the deputy Registrar on 30 January 2020 and I am satisfied that the application for rescission of judgment was timeously made. As such there was no need for the applicant to seek condonation. It was the submission by *Advocate Ndlovu* that applicant was not truthful about the dates it became aware of the default judgment and because of such falsehoods, the application must be dismissed with costs.

Respondent relies on the Sheriff's return of service of 11 October 2019. He did not refer the court to any proof of the service of the actual order served upon the applicant. Maybe respondent wants to convince the court that applicant was negligent, but mere negligence is not itself a sufficient reason for refusing to grant relief.

(See ***Minister of Home Affairs and Ors* v *Vuta*** 1990 (2) ZLR 338 (S) at 338E per MACNALLY JA). Having carefully analysed both parties' heads and pleadings I am satisfied that applicant has proffered and established an acceptable and reasonable explanation relating to the elements of time and both points *in limine* have no merit. They are dismissed.

On the merits of the application for rescission of judgment granted in default, the address where applicant was purportedly served is in Harare and was chanced upon by the

respondent. Applicant states in its papers that the address belongs to and is used by its agents for purposes of returns. I did not hear respondent disputing this. No 303 Lister House, Jason Moyo, Harare does not house applicant nor its employees. It is not disputed by the respondent that no personal service was effected on applicant as its usual address. It can therefore not be concluded that applicant was in wilful default.

> "Wilful default occurs when a party with the full knowledge of the service or set down date of the matter and the risk attendant upon default freely takes a decision to refrain from appearing."
>
> (*Zimbabwe Banking Corporation Limited v Masendeke* 1995 (2) ZLR 400 (SC) per MANALLY JA)

As regards whether applicant for rescission of judgment has a *bona fide* defence, what is required of the applicant is to set out in its affidavit sufficient facts which if proved at the trial will constitute an answer to the plaintiff's claim. What is settled is that the merits of the defence or defences are not to be investigated at the time when rescission is sought. All that the applicant must allege are facts disclosing a defence which should be sufficient if pleaded and accepted on trial to establish that defence. In other words, at the time the application for rescission is made, applicant must show that it has a good and sufficient cause for rescission and a further factor to be considered by the court is whether applicant has a *prima facie* strong main cause or defence to plaintiff's claim.

(See *Madekwani* v *Shonhiwa* 1992 (1) ZLR 269 (S) a 271, *Simbi* v *Simbi* S-164-90 at p 6 of the cyclostyled judgment).

Respondent's legal practitioner acknowledged and confirmed that the pristine accepted practice by these courts from time immemorial is to rescind a judgment granted in default so that parties could be heard on merits. *Advocate Ndlovu* reiterated however that such happens when there is a good and appropriate case and applicant herein is not one of these exceptional cases. Respondent in his papers presented a lot of issues that require full ventilation of facts and which can only be attained in a trial. The agreement of sale attached to his affidavits, the *addendum* written in manuscript specifying the plot numbers and amendments, the amount paid by respondent as well as the oral agreements which came after the written agreement, all these must be adjudged in a bid to find the truth and bring the matter or dispute to an end.

I am contented that applicant has properly placed sufficient grounds for setting aside a judgment granted in default.

On the question of costs, it has been held by these courts (*Minister of Home Affairs and Others* v *Vuta* (*supra*)) that where an applicant in a case of rescission of judgment is seeking

relief, respondent is usually entitled to oppose. In such a case the applicant will usually have to bear costs of the application even if the application is unsuccessful. However, each case must be decided on its peculiar facts and a litigant who snatches a judgment may be expected in a proper case to consent to rescission or to pay the costs of his opposition. In this case the fairest order in my view is to postpone the issue of costs until the matter is resolved on merits.

Disposition

The following order is returned:

a) ***Application for rescission of judgment granted in default under case No. HC 209/18 be and is hereby granted.***
b) ***No order as to costs.***

Hogwe Nyengedza, applicant's legal practitioners
Tabana & Marwa, respondent's legal practitioners