TATENDA PATIENCE MUKUDU

Versus

ANDREW MALETE

IN THE HIGH COURT OF ZIMBABWE
MUTEMA J
BULAWAYO, 18 & 25 NOVEMBER, 2013 & 6 FEBRUARY, 2014

H. Moyo for the applicant
G. Nyoni for the respondent

Opposed Application

MUTEMA J: The practice of law is a preserve for lawyers. Lay persons who do not subscribe to the maxim and attempt to practise law at their own peril venture through a legal minefield which, at the end of it, leaves them legally battered and bruised. That is when they invoke the good sense to engage a lawyer to clean up their mess with the result that sometimes this is akin to shutting the stable door after the horse has long bolted. This is what happened in the instant case.

The applicant sold stand number 4060 Khumalo Township to the respondent via an undated written agreement of sale for Z$120 000 000,00 (revalued). The applicant, in her founding affidavit says the sale was concluded on 8 November, 2007.

This cannot be the correct date because going by the schedule of payments attached to the agreement of sale, the full purchase price was supposed to have been paid by 14 February, 2007. Respondent paid only Z$70 000 000,00 in tranches of Z$19 800 000,00, Z$200 000,00 and Z$50 000 000,00 paid on 8 February, 2007, 9 February, 2007 and 12 February, 2007 respectively.

When the respondent failed to pay the balance of the purchase price applicant says she then invoked clause 7 of the sale agreement and wrote him annexure 'D', a letter dated 15 February, 2007 which reads as follows:

> "RE: AGREEMENT OF SALE
>
> In reference to clause 8 *(sic)* of our agreement whereby you have breeched *(sic)* our agreement by failure to make full payment before the agreed date, I therefore find it necessary to give notice to you to make payment of the outstanding amount within 14 days failure which I will cancel the agreement of sale."

However, according to the agreement of sale (annexure 'C'), clause 8 relates to "Whole

Agreement" while clause 7 provides as follows:

> "7. BREACH
>
> In the event of the purchaser failing to pay any sum owing under this agreement on the due date or in the event of any breach or other conditions of this agreement of sale not being remedied within 14 days of the posting of a written notice to the purchaser the seller shall have the option to institute legal proceedings against the purchaser for the balance of the purchase price owing under this agreement or alternatively to enforce the agreement and claim interest on the outstanding amount at the prevailing bank rate.
>
> 7.1 Should either party initiate legal proceeding *(sic)* against another arising out of this agreement the parties agree to pay all costs as between attorney and client and collection (sic) as is provided for in the Law Society of Zimbabwe (*sic)*."

She says when the respondent did not respond to the notice alluded to above, she wrote him another letter cancelling the agreement of sale. That letter is not attached to this application. On 26 February, 2007, respondent, through his legal practitioners wrote the following letter to her (annexure 'E'):

> "RE: SALE OF STAND 4060 KUMALO TOWNSHIP OF STAND 4125 BULAWAYOTOWNSHIP
>
> We act under the instructions of Reverend Andrew Malete who has shown us your agreement of sale of the above property. We are also informed that you have purported to cancel the same agreement of sale.
>
> We advise you that your attempt at cancellation is illegal and in breach of the Contractual Penalties Act. Our client will ignore this purported cancellation and hereby tenders the balance of the purchase price.
>
> We hope it will not be necessary for us to go to court to get an order to compel you to accept the money and give our client transfer of the property. …"

This letter jolted applicant into engaging Mr *Masuku* then of Ben Baron & Partners to represent her. Messrs Majoko & Majoko who were representing respondent sent a cheque for Z$50 000 000,00 to Ben Baron & Partners representing the balance of the purchase price. The cheque was declined and returned because, according to her, she had "validly cancelled the agreement of sale for his breach."

Respondent then filed an urgent chamber application under cover of case number HC 784/07 seeking an interim order interdicting her from selling, alienating or transferring the stand in question and also an order directing the Deputy Sheriff to place a caveat on the property. The provisional order was granted on 10 April, 2007. She says she duly opposed the application and heads of argument were filed in May, 2007 whereafter the matter "went dead as it was not set down for hearing."

On 25 April, 2012 applicant visited the Registrar of Deeds' office intending to obtain a

copy of the title deeds for the property because, according to her, she wanted to lift the caveat and apply for a loan from her bank using the property as security. She does not say what transpired at the Deeds office but says she proceeded to the High Court where she discovered that respondent had obtained a default court order on 31 May, 2011 against her ordering her to transfer the property to him. This was confirmation of the provisional order that had been issued on 10 April, 2007 under HC 784/07. She then engaged her current legal practitioners to pursue the matter since Ben Baron & Partners had not informed her of the set down of the matter.

Her current legal practitioners, on perusing the court record discovered that the notice of set down had been served on Messrs Webb, Low & Barry Legal Practitioners who had incorporated Ben Baron & Partners but no one had attended court on 31 May, 2011, hence the default order. Mr *Masuku,* it was learnt, had left Ben Baron & Partners and went to Botswana. Correspondence then shuffled between her current legal practitioners and Messrs Webb, Low & Barry who needed the file reference number to enable them to do a search at their archives and those of Ben Baron & Partners. The file could not be located. This contributed to her delay in lodging the application for rescission of the default judgment from 25 April, 2012 up to 28 June, 2012. This is the reason applicant has lodged first the current application for condonation for late filing of the application for rescission of the default judgment. The respondent vehemently opposes the application.

Now the law regarding applications for condonation of late filing of an application for rescission of a default judgment as well as an application for rescission of the default judgment itself is trite. Order 9 Rule 63 (1) of the High Court Rules, 1971 provides:

> "(1) A party against whom judgment has been given in default, whether under these rules or under any other law, may make a court application, not later than one month after he has had knowledge of the judgment, for he judgment to be set aside." For such an application to be granted, good and sufficient cause must be shown: subrule 2.

Where a litigant fails to lodge the application within the one month period but wants to make it after the period has expired, he must first make an application for condonation of the late filing of the application as soon as he/she realizes that he/she has not complied with the rules. If condonation is not sought as soon as possible, he/she should give an acceptable explanation, not only for the delay in making the application for rescission, but also for the delay in seeking condonation – there are thus two hurdles to overcome: *Viking Woodwork (Pvt) Ltd* v *Blue Bells Enterprises (Pvt) Ltd* 1998(2) ZLR 249 (SC).

In the circumstances of the instant case applicant became aware of the default judgment on or about 25 April, 2012. On 30 April, 2012 her current legal practitioners wrote to Webb, Low & Barry enquiring about the default. On 8 May, 2012 Webb, Low & Barry responded advising that it would take a bit of time to locate the file and establish why there was no attendance at the hearing. Their final response came on 14 June, 2012 advising that the file could not be located. By then applicant, who should have filed her application for rescission of the default

judgment by the 25th May, 2012, was already out of time.

Applicant avers that "immediately upon receipt of the letter from Webb, Low & Barry, the applicant proceeded to file the application for condonation on the 28th June 2012."

By all known canons of interpretation, a period of 14 days that was taken to file the application for condonation cannot be said to be "immediate"? The law enjoins an applicant to file the application as soon as possible. Fourteen days surely cannot be as soon as possible? There is absolutely no explanation tendered by the applicant, let alone a reasonable one, what was happening between 14 June and 28 June, 2012 or why the application was not filed between those dates. In the event, since the applicant has not given an explanation, let alone an acceptable one, for the delay of two weeks before making the application for condonation, she has failed to overcome the first hurdle and that should be the end of the matter.

I feel constrained to advert to various other material aspects of this matter. It remains a mystery why the applicant could not simply visit the Registrar's office and peruse the relevant file HC 784/07. She had the case number but she, for some inexplicable reason, decided to pursue the issue with her erstwhile legal practitioners first instead of it being the other way round. The irony of it all is that she got nothing helpful from Webb, Low & Barry but still managed to file this application.

Even if I were to bend backwards in benevolence for the applicant, the maxim the law helps the vigilant and not the sluggard would still work against her. Here is a litigant who is very much aware that she has a matter pending in court and heads of argument had been filed in 2007. She goes for 5 years without hearing from her legal practitioner about the case and she is blissfully happy not to make any effort to enquire and find out about the fate of the matter. She was more than sluggard to say the least. She knows that a caveat had been placed on her property but she goes to the Deeds office to try and have the caveat lifted 5 years down the line to enable her to use that property as security for a potential bank loan knowing that the matter pertaining to the caveat was still in court. This speaks volumes about applicant's attitude to safeguard her interests.

A peek at the merits of the application for rescission in terms of prospects of success does not favour the applicant at all. In *Bosman Transport Works Committee & Ors* v *Piet Bosman Transport (Pvt) Ltd* 1980 (4) SA 794 at 799D-E MULLER JA stated that "… where there has been a flagrant breach of the Rules of this court in more than one respect and where in addition there is no reasonable explanation for some periods of delay and indeed, in respect of other periods of delay no explanation at all, the application should … not be granted whatever the prospects of success may be."

In my opening remarks I bemoaned the conduct of lay persons who take the risk of drafting legal instruments when they do not appreciate the pitfalls involved thereby creating a legal minefield for themselves. *In casu,* the agreement of sale, in clause 3 provides as follows:

"3. PAYMENTTERMS

(a) Purchase Price

The purchase price of the property is the sum of Z$120 000 000,00 (One Hundred and Twenty million dollars only) (revalued) payable according to the herein attached schedule.

SCHEDULE OF PAYMENTS

DATE	AMOUNT PAID	PURCHASER'S SIGNATURE	SELLER'S SIGNATURE
08/02/2007 09/02/2007 12/02/2007	$19 800 000,00 $200 000,00 $50 000 000,00		

Cut-off date for payment is Wednesday 14th February 2007"

Both parties did append their signatures in their respective columns in the above schedule. It is clear that respondent made only three instalment payments as shown above totaling Z$70 000 000,00 leaving a balance of Z$50 000 000,00. Such an arrangement i.e the modus of payment shown above cannot be terms a cash sale. It is certainly an instalment sale which is defined in section 2 of the Contractual Penalties Act [Chapter 8:04] as a contract for the sale of land whereby payment is required to be made in three or more instalments and ownership of the land is not transferred until payment is completed. In the result, in terms of section 8(1)(b), in the event of a breach by the purchaser, no seller under an instalment sale of land can terminate the contract unless he/she has given the purchaser a written notice calling upon the purchaser to remedy the breach within a period which shall not be less than thirty days.

In casu, applicant gave respondent only 14 days to remedy the breach. The notice was accordingly incompetent. She was so advised but did not heed that advice and proceeded to purport to cancel the contract even before the 14 day notice she had given and returned the balance of the purchase price respondent had tendered within thirty days. It cannot therefore be argued that respondent breached the agreement of sale thereby warranting its cancellation.

It is, I must say, inconvenient to the court to be unnecessarily saddled with frivolous applications whose fate is patently doomed from the outset. Surely there should be finality to litigation?

In the result no good cause has been shown by the applicant why her delay in applying for rescission of the default judgment should be condoned. The application for condonation is accordingly dismissed with costs.

Cheda & Partners, applicant's legal practitioners
Moyo & Nyoni, respondent's legal practitioners