HH 142-03
HC 10149/02

`THE REGISTRAR-GENERAL OF ELECTIONS
versus
MORGAN TSVANGIRAI

HIGH COURT OF ZIMBABWE
CHINHENGO J,
HARARE, 21 August, 2003

Opposed Matter

C T Mudenda for applicant
B Elliot for respondent

CHINHENGO J: This was an application for an order rescinding a provisional order confirmed against the applicant in his absence on 13 November, 2002. At the conclusion of the hearing on 21 August, 2003, I dismissed the application with costs. These are my reasons.

BRIEF HISTORY OF MATTER

On 16 October, 2002, a provisional order with the following final and interim relief was issued by MAKONI J against the applicant as the respondent:

> "Terms of the Final Order Sought
>
> That you show cause to this Honourable Court why a final order should not be made in the following terms:
>
> "IT IS ORDERED:
>
> 1. That in relation to the Presidential Election held on 9-11 March, 2002, in order to prove that all the Constituency Registrars in Zimbabwe (who are under the direction and control of the Respondent) have complied with sub-sections (1)-(3) of section 78 of the Electoral Act and that the Respondent has himself complied with sub-section (3) of section 78 of the said Act, the Respondent be and is hereby ordered to produce to this Honourable Court within three (3) days of the date of this Order at some suitable venue in Harare nominated by this Honourable Court, all the separate, sealed packets referred to in sub-section (1) of section 78 of the said Act in compliance with sub-sections (2) and (3) of the said Act in respect of all counted and rejected ballot papers together with counterfoils and used voters' rolls used in all polling

stations in all constituencies in Zimbabwe during the said Presidential Election held on 9-11 March, 2002.

2. That the costs of the application shall be determined by this Honourable Court when it adjudicates upon the Election Petition in Case No. HC 3616/2002.

Interim Relief Granted

Pending the determination of this Chamber Application, the respondent shall preserve, and shall ensure that all the Constituency Registrars in Zimbabwe (who are under his direction and control) shall preserve in separate sealed packets all counted and rejected ballot papers together with counterfoils and used voters' rolls used in all polling stations in all constituencies in Zimbabwe during the said Presidential Election held on 9-11 March, 2002 and shall ensure that the said Constituency Registrars shall transmit the same to him forthwith for him to hold in his safe custody".

The interim relief meant that as from 16 October, 2002 the presidential election material mentioned in the interim order were to be preserved in sealed packets and transmitted by the constituency registrars to the applicant forthwith for him to hold in safe custody. The provisional order was confirmed by OMERJEE J on 13 November, 2003 in the absence of any opposition by the applicant. There is no indication that between 16 October and 13 November, 2002, the applicant complied or attempted to comply with the interim order.

In terms of the final order as confirmed the applicant was required, in order to prove that all constituency registrars had complied with s (1)-(3) of s 78 of the Electoral Act and that he himself had complied with ss (3) of s 78 of the Electoral Act to produce to this Court, within three days of 13 November, 2002, all the presidential election material referred to in the order at some suitable venue nominated by this Court.

After the provisional order was confirmed, the applicant applied on 15 November, 2002 for the rescission of the provisional order as confirmed. The respondent duly opposed the application and on 4 December, 2002 the applicant filed his answering affidavit. Heads of Argument were then filed - the applicant on 26 February 2003 and the respondent on 12 March, 2003. The applicant did not set the matter down for hearing. It was, however, the respondent who, on 9 July, 2003 and on a certificate of urgency in terms of rule 223(A) of the High Court Rules, 1971, applied for the set down of this application. The application was referred to me on 28 July, 2003 whereupon I set it down for the 21 August, 2003.

During the period between the granting of the provisional order and the hearing of this application, the applicant lodged another application which is relevant to this application. It was an application to stay execution of the order granted by OMERJEE J. This application was heard and dismissed by GOWORA J on 27 November, 2002 in Case No. HC 10273/2002.

Two other applications which were heard and determined by this court are relevant to the proper determination of the present application. On 12 September, 2002 and in Case No. HC 8225/2002 the respondent obtained an order from this Court (*per* GUVAVA J) against the applicant (being respondent in that case) which provided that -

> "The respondent shall not destroy and instead shall keep in his safe custody and shall not alter or amend in any way all the documents referred to in section 78 of the Electoral Act (Cap 2:01) pending the outcome of the Election Petition instituted by the Applicant in Case No. HC 3616/2002 against the Respondent and three others".

This order, as is apparent, disallowed the destruction of the presidential election material therein referred. On 26 September, 2002 and in Case No. HC 8657/2002.

MATIKA J refused the applicant the authority to destroy the presidential election material. In all these cases it is clear that the issue between the applicant and the respondent has been the preservation and safe custody of the presidential election material pending the hearing of the election petition lodged by the respondent in Case No. HC 3616/2002. The toing and froing is self-evident :

- in Case No. HC 8225/2002 the respondent applied and obtained an order that the applicant should not destroy the presidential election material in terms of s 78(4) of the Electoral Act;
- in Case No. HC 8657/02 the applicant applied for but was refused permission to destroy the presidential election material although he was granted other relief;
- In Case No. HC 9021/2002, at the instance of the respondent, a provisional order was granted and later confirmed, directing the applicant to preserve and keep in safe custody in Harare all the presidential election material.
- In Case No. HC 10273/2002 the applicant applied for a stay of execution of the order in Case No. HC 9021/2002 and that application was dismissed.

It seems to me that the applicant has not fared well in all these applications in regard to the issue concerned in the present proceedings. The reason therefor will become apparent later on in this judgment.

The Present Application:

The respondent sought the confirmation of the provisional order in Case No. HC 9021/2002 when the applicant had failed to file his opposing papers on time. The

provisional order was consequently granted in the absence of any opposition. It was therefore an order entered in default against the applicant.

An application for the rescission of a judgment entered in default requires that the applicant should show good and sufficient cause for his default. In order to show good and sufficient cause an applicant should comply with certain requirements:

(i) he must give a reasonable explanation of his default. If his default was wilful or it was due to gross negligence the court should not, and normally does not, come to his assistance.

(ii) his application must be *bona fide* and not made with the intention of delaying the plaintiff's claim or relief.

(iii) his defence to the plaintiff's claim must be *bona fide*. If he makes a *prima facie* defence i.e. he sets out averments which if established at the trial would entitle him to the relief asked for, that will be sufficient. In this regard he does not have to deal fully with the merits of the case and produce evidence to show that the probabilities area actually in his favour.

The requirements of good and sufficient cause are set out in many cases, among them - *G D Haulage (Pvt) Ltd* v *Mumurgwi Bus Services (Pvt) Ltd* 1979 RLR 447(A); *Shinga Express (Pvt) Ltd* v *Hubert Davis (Pvt) Ltd* 1989 (2) ZLR 45(H); *Songore* v *Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 240 (S); Stockhil v *Griffiths* 1992(1) ZLR 172(S); *Deweras Farm (Pvt) Ltd & Ors* v *Zimbabwe Banking Corporation* 1998 (1) ZLR 368 (S); *Zimbabwe Banking Corporation* v *Masendeke* 1995 (2) ZLR 400 (S); *V. Saitis & Co (Pvt) Ltd* v *Fenlake (Pvt) Ltd* [2002] 4 All SA 50 (ZH). There is no need for me to deal with these requirements in any detail in view of the many decided cases. What

remains is to apply the facts of this case to the applicable legal principles and determine whether the requirements have been complied with.

Merits of Present Application

In the founding affidavit, the applicant stated that after the provisional order was granted on 16 October, 2002, he instructed the Civil Division of the Attorney-General's office (the Civil Division) to oppose the provisional order. He averred that on 23 October, 2002 he received affidavits "in this matter which I duly signed". These affidavits were returned to the Civil Division on 29 October, 2002 by one of his officials, a Mr Mhende. The affidavits were acknowledged by a Mrs Bangira a senior legal process clerk in the Civil Division. He averred that he was "utterly shocked" when on 14 November, 2002 he learnt that the provisional order had been granted unopposed. He investigated the matter with his legal practitioners in the Civil Division who expressed shock that the provisional order had been granted unopposed. He said that the legal practitioners had told him that they had laboured under a mistaken belief that the opposing papers had been filed. He averred that on further investigation it was established that Mrs Bangira had been negligent. The applicant accordingly contended that he should not be prejudiced because of Mrs Bangira's negligence "in a matter of national importance" and that he should be allowed to file his opposing affidavits. The applicant also averred that he was "unable to enforce the order granted to the respondent" for the reasons set out in the opposing affidavit which he had signed but which was not filed of record leading to the default judgment. The applicant could not have meant that he was "unable to enforce the order granted" but that he was unable to comply with it. His was to comply with and not enforce the order.

Mrs Banjira filed a supporting affidavit. She deposed to the following in paras 3-7 of her affidavit:

> "3. I was advised that I had signed for these affidavits when these were returned by an official of the Registrar-General's office, (Applicant herein), on the 29th October, 2002.
>
> 3.1 This was evidenced by my signature in the delivery book used by the Registrar-General. See Annexure 'A' attached hereto.
>
> 4. I cannot recall what I did with the affidavits after I had received them.
>
> 4.1. The normal procedure is to place these affidavits in the trays of the officer concerned for collection by that officer's clerk.
>
> 5. On investigations I discovered that the law officer's Clerk had not had sight of these affidavits.
>
> 6. We have searched my office and the law officer's office and we located these affidavits in file number 4/HA/2765 YD also a matter involving Morgan Tsvangirai v R G Mugabe and 3 Others (the election petition). See Annexure 'B' attached hereto.
>
> 7. I sincerely regret the confusion caused as a result of my actions".

This is the applicant's explanation for his default. In his opposing affidavit, the respondent dealt with the inadequacies of this explanation. He averred that Annexure "A" attached to the applicant's affidavit did not give a date as to when the applicant's opposing affidavits were delivered to the Civil Division. In this averment the respondent was wrong. Annexure "A" indicates that the affidavits were delivered on 29 October, 2002. For present purposes therefore it can be accepted that the opposing affidavits were delivered to the Civil Division on 29 October, 2002. The respondent averred that since a legal practitioner in the Civil Division had dealt with the matter at the time that the provisional order was granted that legal practitioner should have ensured that the opposing affidavits were filed on time. The legal practitioner concerned did not, in this application, file any affidavits to explain her failure to file the affidavits timeously. The applicant attempted in his answering affidavit to explain the legal practitioner's failure to file the opposing affidavits in these words -

> "It is a fact that there are now too many files involving myself and the Respondent. Misfiling can be expected to occur".

These unfortunately are the words of the applicant and not those of any legal practitioner in the Civil Division who should speak for herself. There would be no need for the applicant to speak on behalf of the Civil Division or to attempt to explain what may or may not have happened in the Civil Division. An affidavit was, however, filed by Miss Mudenda, a legal practitioner in the Civil Division, apparently in response to the respondent's challenge that there was no affidavit by a legal practitioner in the Civil Division to explain what had happened. Miss Mudenda averred that the legal practitioner handling the matter could not file a supporting affidavit because she intended to argue the matter in court. Yet when the matter was heard on 21 August, 2003, Miss Mudenda who had filed a supporting affidavit argued the matter herself. This obviously created a doubt as to the real reason why the legal practitioner handling the matter did not file a supporting affidavit when, as it later transpired, the legal practitioner who filed a supporting affidavit, Miss Mudenda, actually argued it.

Mrs Bangira's supporting affidavit is vague. She is a clerk in the Civil Division. In her affidavit she said that she "was advised" that she had signed for the affidavits and that her signature in the delivery book was evidence of the fact that she had received the affidavits. Quite clearly Mrs Bangira is not positive in her averments. She does not say that she received the affidavits or that she signed for them. Her lack of positiveness is borne out by her statement that she does not recall what she did with the affidavits. She fails to explain how the affidavits ended up in file number 4/HA/2765 YD when "the law officer's clerk had not had sight of those affidavits".

The application in Case No HC 9021/2002 was "a matter of national importance" as far as the applicant was concerned. Yet when he received the affidavits from the Civil Division on the 23 October, 2003 and signed them (see para 4.1 of the founding affidavit) those affidavits were not immediately returned to the Civil Division until 29 October, 2002. This is hardly the manner in which the applicant is expected to handle a matter of national importance. On the part of the applicant's legal practitioner also, having represented the applicant at the hearing of the provisional order and having lost the case at that stage, the legal practitioner should have been alert to the fact that the matter was "of national importance" and needed to be followed up to ensure that all the necessary papers were filed on time. There is no affidavit by the legal practitioner who handled the matter to show what she did to ensure that the affidavits were filed timeously. The explanation for the default is in my view inadequate as it does not tell what actually happened leading to the failure to file the opposing affidavit. It seems to me that there was dilatoriness on the part of the applicant himself and on the part of his legal practitioner. Wilfulness generally "connotes deliberateness in the sense of knowledge of the action and its consequences … and a conscious and freely taken decision to refrain from giving notice of intention to defend" (*Manjean t/a Audio Video Agencies* v *Standard Bank of SA Ltd* 1994 (3) SA 801 (C)) but "unconcern or insouciance" (*Howard* v *Estates Dewes* 1930 OPD 119) is the more appropriate description of an attitude to the proceedings which amounts to wilfulness. I am satisfied that the delay of about six days by the applicant in forwarding the signed affidavits to the Civil Division, the absence of an affidavit by the lawyer handling the application on the applicant's behalf, the failure by anybody to clearly explain what happened to the affidavits once they were delivered to

the Civil Division indicate unconcern or insouciance which the court cannot condone or approve of. Even if the fault could be squarely laid at the feet of the applicant's legal practitioner, the vagueness of the explanation as given by Mrs Banjira as to what actually happened in the legal practitioner's office and the absence of any explanation by the legal practitioner herself leads me to the conclusion that the explanation for the default is not reasonable. After representing the applicant at the hearing of the provisional order and having been fully aware of the "national importance" of the application it does not appear that the legal practitioner did anything to ensure that the papers were filed timeously. In *Colyn* v *Tiger Food Industries Ltd t/a Meadow Feed Mills* Cape [2003] 2 All SA 113 (SCA) JONES AJA stated as follows -

> "While the courts are slow to penalize a litigant for his attorney's inept conduct of litigation, there comes a point where there is no alternative but to make the client bear the consequences of the negligence of his attorneys…".

The subsequent failure by the applicant's legal practitioner to prosecute this matter diligently is further evidence of the ineptitude with which she conducted this case. There is thus no sufficient explanation to meet the requirement that the default should not be regarded as wilful. I accordingly regarded the explanation given as vague, intended to delay maters and quite insufficient.

The second requirement for the rescission of an order or judgment granted in default is that the application for rescission must be *bona fide*, that is to say, it must not be intended to delay the claim by the other party. The various applications to which I have referred bring into question the application's *bona fides*. These are the decisions of this court in Cases Numbers HC 8225/2002; HC 8657/2002; HC 9021/2002 and later HC 10273/2002. The failure to comply with the interim order indicates an initial

unwillingness to comply with the terms of the provisional order. I do not think that I need to say more about the application's *bona fides*.

It is generally accepted that whilst the inadequacy of the explanation for default may well justify a refusal of rescission, its weakness may be cancelled out by the applicant putting forward a *bona fide* defence which has a good prospect of success (*Colyne's* case *supra*). This however is subject to the cautionary statement made in *Chetty* v *Law Society, Transvaal* 1985 (2) SA 756 (A) at 767H-769D that -

> "As I have pointed out, however, the circumstance that there may be reasonable or even good prospects of success on the merits would satisfy only one of the essential requirements for rescission of a default judgment. It may be that in certain circumstances, when the question of the sufficiency or otherwise of the defendant's explanation for his being in default is finely balanced, the circumstances that his proposed defence carries reasonable or good prospects of success on the merits might tip the scale in his favour in the application for rescission. But this is not to say that the stronger the prospects of success the more indulgently will the court regard the explanation of the default. An unsatisfactory and unacceptable explanation remains so, whatever the prospects of success on the merits. In the light of the finding that the appellant's explanation is unsatisfactory and unacceptable it is therefore, strictly speaking, unnecessary to make findings or to consider the arguments relating to the appellant's prospects of success. Nevertheless, in the interests of fairness to the appellant, it is desirable to refer to certain aspects thereof".

I do not thin that it should be "in fairness" to the other party that the court has to consider that party's prospects of success. In *V Saitis*, *supra*, it was stated that the true test for a rescission of judgment is whether good and sufficient cause has been established and that the three requirements must generally be examined together and not in isolation, hence the statement at 57e-f that -

> "To my mind BLACKIE J (in *Shinga Express, supra*) was not saying that the test for 'good and sufficient cause' or 'sufficient cause' was 'wilful default' alone. He was in fact simply stating that if one fails to establish the existence of an essential element of 'sufficient cause', then he is unlikely, and does usually fail, to establish 'sufficient cause'".

Without laying down a general rule of law that in all cases the judge must examine whether or not all the requirements of good and sufficient cause have been met, I will now proceed to inquire into whether the applicant has good prospects of success on the merits. Those prospects are addressed in the opposing affidavit which the applicant should have filed but failed to do as discussed above. It seems to me that applicant's case is founded on three grounds - (a) that the respondent cannot rely on s 78(3) of the Electoral Act for the relief he sought because the presidential materials ceased to be governed by the Electoral Act but are now governed by an order of court. This, the applicant argues, was because the respondent applied to enforce s 78(3) of the Electoral Act after the expiry of the six months period specified in that section; (b) that he has no physical space where the presidential election material can be stored : they should be stored at the constituency registrar's offices, (c) the order by GUVAVA J in Case No HC did not obliged the applicant to store the presidential election material in Harare, and (d) that he has no funds to ensure compliance with the order.

If the applicant had not been dilatory in prosecuting this application and that application had been heard as a matter of urgency, I probably would have had cause to examine his arguments differently. This application was only heard after judgments were handed down in Case No. HC 8657/2002 by MATIKA J and in Case No. HC 10273/2002 by GOWORA J. I cannot disregard those judgments as it seems to me there was no reason to persist in this application after those judgments were handed down. That perhaps explains why the applicant did not move to set down the matter. He must have

realised that his prospects of success were not good. Section 78 of the Electoral Act provides in the relevant sub-sections as follows:

> "(1) As soon as may be after polling day or the last polling day, as the case may be, in his constituency, the constituency registrar shall enclose in separate sealed packets the counted and rejected ballot papers.
>
> (2) A constituency registrar shall not open any -
> (a) sealed packet containing -
> (i) counterfoils of used and spoilt ballot papers; or
> (ii) postal ballot papers and declarations of identity;
> that has been delivered to him in terms of sub-section (2) of section *sixty*; or
> (b) sealed packet containing documents referred to in subsection (1) or (2) of section *seventy*; or
> (c) packet that has been re-sealed by him after examination in terms of paragraph (d) of sub-section (3) of section *seventy-two*; or
> (d) sealed packet containing counted or rejected ballot papers;
> while such packet remains in his custody.
>
> (3) As soon as may be after polling day, the constituency registrar shall transmit to the Registrar-General in separate packets -
> (a) all the packets referred to in sub-section (2); and
> (b) the statement in terms of sub-section (3) of section *sixty* and the report of the result of the verification thereof;
> and shall endorse on each packet a description of its contents and the date of the election to which it relates.
>
> (4) The Registrar-General shall retain for six months all the documents referred to in subsection (2) and then, unless otherwise directed by an order of the High Court, shall cause them to be destroyed".

These provisions are clear. They obliged the constituency registrars to keep election materials referred to in that section in sealed packets and not to open any such packets whilst in their custody. They require the constituency registrars to transmit the said election materials to the Registrar-General after making certain endorsements on each packet. The word "transmit" has a very clear meaning. It is used in its ordinary

sense to mean "send"; "deliver"; "forward"' "dispatch"; or "pass on". There can be no other legislative intention in s 78(4) than to require the constituency registrars to send the election materials to the Registrar-General in Harare.

The order sought to be rescinded is an order which, in my view, is in accordance with s 78(3) of the Electoral Act. The stipulation in the order that the presidential election material should be transmitted to the applicant within three days was intended to give effect to the requirements of that provision that the material be transmitted to the applicant "as soon as may be after polling days". There is therefore no merit to the applicant's contention that s 78(3) does not require the constituency registrars to transmit the election material to him in Harare.

The applicant's contention that the said presidential election material is no longer kept by him pursuant to s 78 but in terms of a court order is specious. It is s 78(4) which provides the authority upon which the High Court may order or direct that the election material should not be destroyed. If this subsection did not provide accordingly there would be no basis for the High Court to make such an order. The Electoral Act (s.78(4)) and the High Court order both provide the basis upon which the applicant is required to keep the presidential election materials in his safe custody in Harare. The High Court order is therefore in terms of the Electoral Act and the presidential election materials are, therefore, kept in terms of that Act.

The respondent said that he has no physical space and financial resources with which to give effect to the order. That argument was shot down by MATIKA J in his judgment in Case No. HC 8657/2002 where he said:

> "He (applicant) is only obliged to store the election materials in sealed packets. Whether there are logistical problems in storing them, the space or whatever is not the concern of this court. It is an administrative issue which is upto the applicant to determine how best to deal with that aspect".

GOWORA J made the same point more emphatically at page 4 of her judgment in Case No. HC 10273/2002 :

> "The order by MAKONI J is enforcing the applicant to comply with what is a statutory duty. The election material should have been sealed in packets and sent to the applicant by the constituency registrar shortly after the last polling day. The respondent should not have been put to the expense of applying to court for the applicant to be compelled to comply with the provisions of the Act. In compliance with the Act, the applicant should have made provision for storage space of the materials from the constituency registrars. As far back as 12 September, 2002, the applicant has had knowledge of the respondent's interest in the ballot papers and should have made adequate arrangements for the transmission and storage in Harare in compliance with the provisions of section 78(3) of the Act. The transmission of the papers to Harare, is not, in my view, a function outside the ambit of the applicant's functions, such that a specific request for funds should be made to Treasury. It is an administrative function which is part and parcel of and ancillary to the election process for which the applicant should have provided for at the time of holding elections".

I do not think it is necessary to deal with the registrar's argument regarding financial resources. The position was clarified by the above mentioned orders of two eminent judges of this court. His was to ensure that he paid heed to the pronouncements of the learned judges subject, of course, to his right of appeal against any of their decisions with which he may have been aggrieved. He cannot derive any comfort from the statement by GUBBAY CJ in *Chairman, PSC & Ors* v *Zimta & Ors* 1996 (1) ZLR 637 (S) at 645 C-G where he said that the courts cannot in general interfere with the Government's prerogative as to the allocation of funds. The facts of the present case are distinguishable from those in that case. The essential question in *Zimta's case supra* was whether the court could order the PSC and therefore the Government to provide funds to

pay bonuses to civil servants where, pursuant to an enabling law, the PSC had cancelled the payment of bonuses to civil servants. Here the issue is simply one where the applicant is required to perform a function required of him by Statute and in the normal course of his duties. The facts indeed are quite distinguishable.

In the result I am satisfied that the applicant has not given a reasonable explanation for his default, that his application is not *bona fide* and that it has no reasonable or good prospects of success on the merits. I am satisfied that he failed to establish that he has good and sufficient cause as required by Rule 63(2) of the High Court Rules, 1971 to have the judgment in Case No. HC 9021/2002 rescinded.

These were my reasons for dismissing the application with costs.

Gill Godlonton & Gerrans, appellant's legal practitioners
Civil Division of the Attorney-General's Office, applicant's legal practitioners