ANDREW NOEL CRANSWICK
versus
RETIRED MAJOR GENERAL HAPPYTON BONYONGWE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 12 June 2014 & 25 February 2015

Opposed Application

J. S. Samukange, for the applicant
E. T. Moyo, for the respondent

ZHOU J: This is an application in terms of Order 9 r 63 of the High Court Rules, 1971 for the setting aside of a judgment given in default of the applicant in Case No. HC 275/11. The judgment was given on 16 November 2012. The application is opposed by the respondent. The background facts may be summarised as follows:

In January 2011 the respondent instituted proceedings by way of summons under Case No. HC 275/11 claiming payment of damages for defamation against the applicant. The applicant entered appearance to defend the claim and filed a plea. The matter went up to the pre-trial conference stage. On 22 November 2011 the applicant's defence was struck out following his default at the pre-trial conference. The matter was then referred to be dealt with as an unopposed matter for the respondent, as the plaintiff, to prove his damages. Upon becoming aware of the striking out of his plea the applicant made a chamber application under Case No. HC 12658/11 for the setting aside of the order granted in his default at the pre-trial conference and for the reinstatement of his plea. That application was filed on 20 December 2011. It was dismissed with costs on the same day, 16 November 2012, and in the same order granted against the applicant for payment of damages for defamation in the sum of US$10 million. The main case therefore proceeded as an unopposed matter. That is the judgment which the applicant invites this court to rescind in the instant application.

The respondent objected to the application on the basis that the matter is *res judicata*. The objection is premised upon the fact that an earlier application made on behalf of the applicant for the setting aside of the order made in default of the applicant at the pre-trial

conference was dismissed with costs. But that application related to the order given at the pre-trial conference. I am not prepared to accept that the facts relevant to the instant application were determined by this court. The instant application relates to the default of the applicant in relation to the order which was granted on 16 November 2012. There are facts which may be unique to the applicant's default on 16 November 2012 which would not be relevant to his default at the pre-trial conference. The default on the 16th was consequent upon the rejection of the applicant's application in HC 12658/11. The applicant's legal practitioner was in attendance on the day that the order for payment of damages was given. Further, the order dismissing the application for rescission of judgment filed in HC 12658/11 makes no reference to that case number at all. It also contains no reasons which would enable the court to consider whether any factual findings were made on the basis of which the defence of issue estoppel may be sustained. For those reasons, I do not accept that the matters raised in this application are *res judicata*. I also do not accept that the defence of issue estoppel can be sustained on the basis of the facts of this matter.

Order 9 Rule 63 provides as follows:

> "(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 the judgment to be set aside.
> (2) If the court is satisfied on application in terms of subrule (1) that there is good and sufficient cause to do so, the court may set aside the judgment concerned and give leave to the defendant to defend or to the plaintiff to prosecute his action, on such terms as to costs and otherwise as the court considers just."

The application *in casu* was instituted on 23 November 2012, some seven days after the default judgment was granted. It was therefore made timeously in terms of subrule (1). What must be considered, in my view, is whether "good and sufficient cause" has been established to trigger the exercise by this court of its discretion in favour of the applicant. The expression "good and sufficient cause" bears no precise definition. The approach of the courts, which has stood the test of time, is that in considering whether good and sufficient cause has been established in the context of rescission of a default judgment the court will take into account the following factors:

(a) The reasonableness of the applicant's explanation for the default;
(b) The *bona fides* of the application to rescind the default judgment; and
(c) The *bona fides* of the defence on the merits of the case and whether that defence carries some prospect of success.

The above factors are considered not only individually but in conjunction with one

another and with the application as a whole. See *Stockil* v *Griffiths* 1992 (1) ZLR 172(S) at 173E-F; *Mdokwani* v *Shoniwa* 1992 (1) ZLR 269(S) at 270B-D. Put in other words, the court will examine and weigh the above factors one against the other, and also take into account all the other circumstances which may be relevant to the case. The court has cautioned against the unnecessary fettering of its discretion by embracing a rigid approach in the consideration of whether good and sufficient cause has been established as contemplated by r 63(2). See *Dewera's Farm (Pvt) Ltd & Ors* v *Zimbabwe Banking Corp Ltd* 1998 (1) ZLR 368(S) at 369E-F; *Dewera's Farm (Pvt) Ltd & Ors* v *Zimbabwe Banking Corporation* 1997(2) ZLR 47(H) at 57F-G.

The applicant's explanation for his default is that he was not aware of the date of the set down. The notice of set down was not served upon him. It was served at an address in the United Kingdom at which he did not reside. That address was stated as his last known address in the notice of renunciation of agency which was filed by his legal practitioners when they renounced agency. That fact does not take away the reasonableness of the explanation for default, which is that the applicant did not see the notice of set down and was not, therefore, aware of the date of the pre-trial conference. Indeed, even in cases where service was effected at a party's *domicilium citandi et executandi* the courts have been prepared to accept as reasonable an explanation tendered by the party if he did not see the papers. See *Stockil* v *Griffiths* (*supra*) p 173G-174B.

The applicant acted promptly upon realising that his defence had been struck out following his failure to attend the pre-trial conference. He became aware of the default judgment in Case No. HC 275/11 a day after it had been granted. He instituted the instant application within seven days of the order being made. His conduct shows that the application is being made with the *bona fide* intention to protect his interests.

As regards the merits of the defence, the court must be satisfied that the applicant has set forth facts which disclose "a defence which on the face of it cannot be rejected out of hand and warrants investigation". *Mdokwani* v *Shoniwa* (*supra*) p 274C. The facts alleged and the evidence, if any, tendered, must show that the defence is being advanced in good faith and not merely for the purpose of frustrating enforcement of the judgment. The prospects of success of that defence must be assessed by reference to those facts and the evidence. The applicant states that he did not publish the statements complained of by the respondent. The respondent relies on reports attributing the information to the applicant. The question of whether or not the statements complained of were published by the applicant is a matter that will require

investigation in a trial. The statements which are attributed to the applicant are alleged to have come through the medium of what has come to be referred to as the "Wikileaks report". The authenticity of the source of the information to the Wikileaks will need to be established in the trial. There is also the issue of the damages awarded. A sum of US$10 million for damages for defamation is, on the face of it, out of the ordinary in this jurisdiction. The awards made in respect of damages for defamation since the introduction of the multicurrency system are significantly lower than that figure. See *Makova* v *Masvingo Mirror (Pvt) Ltd & Ors* 2012 (1) ZLR 503(H) in which a sum of US$7 000 was awarded as damages for defamation; *Manyange* v *Mpofu & Ors* 2011(2) ZLR 87(H) in which an award of US$6 000 was made; and *Nkala* v *Sebata & Anor* 2009 (2) ZLR 2003(H), in which a sum of US$2 000 was awarded. A full trial will enable the court, in the event that liability is established, to properly assess the damages due to the respondent taking into account the factors relevant to such an inquiry. See *Masuku* v *Goko & Anor* 2006 (2) ZLR 341(H) at 350D-F; Shamuyarira v *Zimbabwe Newspapers (1980) Ltd & Anor* 1994 (1) ZLR 445(H) at 502.

The principle of finality in litigation is one that this court values. It must, however, be balanced against the need to do justice between the parties to litigation. Taking into account all the relevant factors, I am convinced that good and sufficient cause has been established for this court to set aside the default judgment. The effect of my order is to reinstate the applicant's defence which was struck out. It is appropriate that costs be ordered to be in the cause since this application does not dispose of the real dispute between the parties.

In the result, IT IS ORDERED THAT:

1. The order granted in Case No. HC 275/11 in default of the applicant on 16 November 2012 be and is hereby set aside.
2. The applicant's plea in Case No. HC 275/11 be and is hereby reinstated, and the matter shall proceed to the pre-trial conference stage in terms of the rules of this court.
3. Costs are to be in the cause.

Venturas & Samukange, applicant's legal practitioners
Scanlen & Holderness, respondent's legal practitioners