DELTA BEVERAGES (SORGHUM OPERATIONS)
and
THE CHAIRPERSON OF THE DISCIPLINARY COMMITTEE N.O
(DELTA BEVERAGES – SORGHUM OPERATION)
versus
EVERSON CHIRAU

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 24 May 2018 & 18 July 2018

Opposed Matter

T. Pasirayi, for the applicants
N. Mugiya, for the respondent

DUBE: The second applicant seeks to rescind a default order granted against it in terms of r 63.

The background to this application is as follows. The respondent was employed as a driver salesman at the brewery of the second applicant. Disciplinary proceedings were brought against him on a charge of theft. The allegations were that he sold the second applicant's product but did not subsequently bank the sales as required. The applicant was served with an application for a declaratory order on 22 November 2017 during the disciplinary hearing. It did not respond to the application. It proceeded with the disciplinary hearing. The respondent was dismissed on 29 November 2017.On 7 February 2018 the respondent obtained an order in default declaring the disciplinary hearing proceedings against him unlawful and wrongful and setting them aside. The default order arose from the fact that the applicants failed to oppose the proceedings for a declarator.

Only the first applicant seeks rescission of the default order. Its explanation for the failure to oppose the application goes thus. The application was served on the applicants during the disciplinary hearing. The second applicant failed to forward the application to its legal practitioners to file a notice of opposition. The application was inadvertently and erroneously overlooked and not dealt with due to pressure of work. It was not the applicants' intention not to oppose the application. The error was realized when the applicants were advised of the

default order. The applicant maintains that they intended to oppose the application. It contends that this is evident from the fact that the applicants opposed an application for review of the same disciplinary hearing filed in December 2017 by the respondent.

The applicant submitted that the application for rescission of the default order is *bona fide* and that it has *bona fide* prospects of success on the merits of the matter sought to be reopened. The Applicant submitted that the respondent filed an application for review under guise of a declarator when what he actually was seeking is a review of the disciplinary proceedings. Further, that the respondent failed to exhaust domestic remedies available to him in terms of the employer's code of conduct. The applicant further submitted that the effect of the order sought is to permanently bar the applicant from conducting disciplinary proceedings against its employee which is prejudicial to the applicant. They contended that the order sought cannot be allowed to stand.

The respondent opposes the application. He raises two preliminary points. He submitted as follows. The applicants have approached the court with dirty hands in that they have not complied with the default order by refusing to re-instate the respondent. He urged the court not to entertain the application until the applicants have purged their contempt. The second point taken is that the founding affidavit filed in support of the application is fatally defective in that the deponent to it has failed to establish authority to depose to the founding affidavit. On the merits, the respondent insisted that the applicants were in wilful default and urged the court to find that the explanation for the default proffered is not reasonable. He submitted that the applicants have no prospects of success in the main matter. He urged the court to dismiss the application. When the parties appeared before me, they argued only the preliminary issues. The court was asked to deal with the merits of the application on the papers.

Order 22 r 227 (4) of our rules permits a person who can swear positively to the facts or averments contained in an affidavit to depose to that affidavit. A respondent alleging lack of authority on the part of a deponent to a founding affidavit is required to place before the court evidence or facts demonstrating such lack of authority, see *Direct Response Marketing (Pvt) Ltd* v *Shepherd* 1993 (2) ZLR 218. In this case, the court held that unless peculiar circumstances exist, an averment in an affidavit to the effect that the deponent has authority to depose to an affidavit suffices. In *Mall [Cape] (Pty) Ltd* v *Merino Ko-operasie* BPK 1957 (2) Sate court held that a deponent to a founding affidavit must satisfy the court that it has the correct litigant before it. Where there is no actual authority authorizing him to bring the proceedings challenged, the deponent to the founding affidavit is required to place a 'minimum of evidence'

before the court to show that he has the requisite authority to bring the proceedings. In the case of *Madzivire and Ors* v *Zvarivadza and Ors* SC 10/06 the court remarked as follows:

> "Each case must be considered on its own merits and the courts must decide whether enough has been placed before it to warrant the conclusion that it is the applicant which is litigating and not some unauthorized person on its behalf."

In a case where a respondent challenges the authority of an applicant to bring proceedings, the courts' approach is to look at the evidence adduced by the respondent in support of that assertion. Where the respondent has failed to adduce any evidence to show that the applicant is improperly before the court, the courts require the deponent to the founding applicant to produce 'a minimum of evidence' to show that he has authority to institute the proceedings .This is not an easy task for the respondent as such information is usually only within the domain of the applicant. It is up to the court to decide whether sufficient evidence has been placed before it to show that the deponent to the founding affidavit was not on a frolic of his own. Each case depends on its own circumstances.

In the case of *Hadkinson* v *Hadkinson* [1952] 2 ALL ER 567 (CA), the court held as follows:

> "It is the plain and unqualified obligation of every person against , or in respect of whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged … The fact is that anyone who disobeys an order of the court…. is in contempt…"

In *ANZ (Pvt) Ltd* v *Minister of State for Information* 2004 (1) ZLR the court remarked as follows:

> "This is a court of law and as such cannot connive at or condone the applicants' open defiance of the law. Citizens are obliged to observe the law of the land and argue afterwards. It was entirely open to the Act before the deadline for registration and thus avoid compliance with the law its objects to pending to a determination of this court."

The court will not grant relief to a litigant who approaches the court with dirty hands in the absence of good cause being shown or until such defiance or contempt has been purged. See also *Nqobile Khumalo and Anor* v *Maon Trading (Pvt) Ltd & 4 Ors* HB 279/17, *Lindsay* v *Lindsay* 1995 (1) ZLR 296. *C F I Retail (Pvt) Ltd* v *Eric Masese Manyika* SC 8/16.

The general approach of the courts is that a court order is deemed valid until it has been set aside. A litigant who is aggrieved by the outcome of a court case is required to comply with the order granted against him first, for as long as it is still extant and has not been suspended, before he seeks a reversal of the order. Where he fails to comply with such an order, he is said to be in open defiance of the law. He must observe the law first and seek to find redress only after complying with the order. He may not seek to other legal remedies before he complies

with the order. The courts will not perpetuate a litigant's open defiance of the law. A litigant is said to be in defiance of a court order and has dirty hands were he has failed to comply with the terms of an order of court. The effect of the dirty hands principle is to ensure that a party who is in defiance of a court order which imposes a direct obligation on him to act in a specific manner complies with the order. The practice of our courts is not entertain him until he has purged his contempt.

The deponent to the applicants' founding affidavit is its human resources manager. He avers in the founding affidavit that he is employed by the first applicant as its human resources manager and that he is, in that connection duly authorised to depose to the affidavit on behalf of the applicant. Further, that the facts that he deposes to are within his knowledge and he believes them to be true and correct. His assertion that he is authorised to depose to the founding affidavit has not been meaningfully challenged. The respondent was required to say much more than that the deponent has not filed a resolution authorising him to depose to the affidavit. It is not a requirement for a deponent to a founding affidavit to attach proof of authority at the commencement of proceedings. The deponent to the founding affidavit is the applicant's human resources manager. He would have been in charge of the disciplinary proceedings and the one responsible for bringing these proceedings. He is conversant with the facts of this case and is qualified in terms of r 227 (4) to swear positively to the facts and averments contained in the founding affidavit. There is no evidence to suggest that the deponent to the founding affidavit lacks authority to depose to the affidavit. In the absence of any evidence to the contrary, the court accepts that he has authority to institute proceedings against the respondent.

The operative part of the default order obtained reads as follows,

"1. The disciplinary hearing proceedings against the applicant by the first respondent be and are hereby held to be unlawful and wrongful and accordingly set aside.

2. The disciplinary hearing against the applicant be and is hereby permanently stayed.

3. The respondents are ordered to pay costs of suit on a client-attorney scale jointly and severally one paying the other to be absolved."

At the time that the disciplinary proceedings were instituted, the respondent was still at work and attending to his duties and had not been suspended from duty. He was dismissed on 29 November 2017 following the disciplinary hearing and well before the default order was granted in February 2018. The dismissal was carried out as a result of the disciplinary proceedings and did not occur after the order. It cannot be said that the applicants acted in open defiance of a court order. In any event, the effect of the default order was to

declare the disciplinary proceedings unlawful and wrongful, set aside and stay them permanently. It was never the objective of the respondent in those proceedings to get an order reinstating him as he was still at work at the time he launched the application. Consequently, the effect of the order is not to reinstate the respondent into his employment. In the *CFI Retail* case, the court held that the purpose of the dirty hands principle is to ensure that a party who is under direct obligations imposed by law to act in a specific manner complies with court orders. The applicants were not under any obligation either directly or indirectly imposed by the order to reinstate the respondent. The applicants fully complied with the order because they stayed the proceedings as directed by the court order. They were not under any obligation to do anything further. When the order was granted on 7 February 2018, the respondent had already been dismissed on 27 November 2017. Once the respondent became aware of the dismissal, his only recourse was to file for unfair dismissal instead of trying to ride in this case, on an order that does not have the effect of reinstating him. The respondent's argument that the applicants have dirty hands in that the applicants were obliged in terms of the order to reinstate the respondent does not find favour with the court. The respondent's points *in limine* fail.

The approach to dealing with an application for rescission of judgment was laid out in the following cases; *Stockhill* v *Griffiths* 1992 (1) ZLR 172 (S), *Deweras Farm (Pvt) Ltd and Ors* v *ZB Corp* 1998 (1) ZLR 238 (S), *NRZ* v *Bruno Enterprises (Pvt) Ltd* HH 23-16. An applicant t seeking default judgment in terms of r 63 is required to show good and sufficient cause for granting of the r 63 (2) reads a s follows,

> "(2) If the court is satisfied on an 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 factors that a court will take into account in determining whether an applicant has discharged the onus of showing good and sufficient cause are as follows:

a) the length of the delay in applying for rescission
b) the reasonableness of the explanation for the delay
c) the *bona fides* of the applicant's defense on the merits of the case
d) the balance of convenience.

These factors are to be considered cumulatively.

The applicants were served with the application for a declaratory on 22 November 2017.They failed to oppose the application resulting in default judgment being granted on 7

February 2018. The applicant acted promptly on becoming aware of this order to have it set aside. By 19 February 2018 the applicant had already filed his application barely 10 days after it became aware of the order. The delay in filing this application is minimal. It appears to the court that the applicant is *bona fide* when it says that it wants to have its day in court.

The applicant failed to oppose the application due to oversight. I find no reason to disbelieve the applicant especially regard being had to the fact that it opposed the other application filed by the respondent .It is within human experience to forget to do some things especially at a time that the person is engaged with other pressing business. The applicants were engaged in the disciplinary proceedings. There is no evidence to suggest that the applicants deliberately abstained from opposing the application. It is plausible that they failed to oppose the application through oversight. I find the explanation for the default proferred by the first applicant reasonable.

The order obtained by the respondent is one declaring the disciplinary hearing unlawful, wrongful and setting it aside. The declaratory order sought is based on factual issues. It is incompetent to issue a declaratory order relating to factual issues. The respondent has not highlighted any rights on which to hinge the application for declaratory relief. The basis of the challenge which is said to be illegality of the disciplinary hearing is not disclosed on the papers filed. The respondent filed an application for a declaratory under guise of an application for review. What the respondent sought was a review of the disciplinary proceedings. He ought to have filed an application for review in the Labour Court. The respondent was not properly before the court. Even if it is accepted that there were irregularities concerning the hearing, it does not follow that the hearing ought to be declared illegal. The effect of the order is to permanently bar the applicant from conducting disciplinary proceedings against the respondent. An order staying permanently the applicant from instituting the disciplinary hearing is prejudicial to the applicant who is entitled at law to discipline its employees.

The allegations levelled against the respondent were that on various dates the applicant sold the second applicant's product and failed to bank the sales as required. The respondent does admit in his pleadings under HC 1089/17, where he seeks a review of the disciplinary proceedings, to paying the missing money which was subject of the disciplinary hearing. He in fact promised to restitute the monies stolen to his employer. That averment is not refuted by the respondent. The circumstances under which he paid the missing money will be under scrutiny in the application for a declaratory order once that case is reopened. Because the theft

is admitted, I must conclude that the applicant has *bona fide* prospects of success on its defense on the merits of the matter sought to be reopened.

Having weighed all the factors cumulatively, I view that the interests of justice demand that the matter be fully ventilated .The applicant has shown good and sufficient cause for rescission of the order granted in default. Accordingly, the application for rescission of judgment succeeds.

In the result it is ordered as follows:

1. The default judgment granted on 7 February 2018 in case number HC 1089/17 be and is hereby set aside.
2. The applicants be and are hereby ordered to file a Notice of Opposition within five (5) days from the date of this order.
3. The respondent is to pay the costs of the application.

Gill, Godlonton & Gerrans, applicants' legal practitioners
Mugiya and Macharaga Law Chambers, respondent's legal practitioners