REPORTABLE (19)

Judgment No. SC 23/07
Civil Appeal No. 191/06

CHIHWAYI ENTERPRISES (PRIVATE) LIMITED t/a PAINT & TOOLS HARDWARE

v ATISH INVESTMENTS (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & MALABA JA
HARARE, FEBRUARY 6 & SEPTEMBER 7, 2007

F M Katsande, for the appellant

O Mushuma, for the respondent

SANDURA JA: This is an appeal against a judgment of the High Court which set aside a default judgment granted in favour of the appellant ("the Hardware") on 3 September 2003.

The background facts in this case may be tabulated conveniently as follows –

1. On 20 June 1995 the respondent ("Atish") acquired a piece of land ("the stand") from the City of Harare.

2. In July 2005 Atish decided to sell the stand. Accordingly, it instructed a registered estate agent and valuer to inspect the stand and prepare a

valuation report. Thereafter, the estate agent inspected the stand and reported to Atish that the stand was in the possession of the Hardware.

3. Following that discovery, Atish instructed its lawyers to investigate the circumstances in which the Hardware acquired the stand.

4. On 4 August 2005 the lawyers conducted a search at the Deeds Registry, and on the following day visited the High Court where they perused the record of case no. HC 6950/2003. They discovered that on 7 May 2002 a Mr James Muindisi ("Muindisi") fraudulently sold the stand to the Hardware, and that a purported agreement of sale had been signed by Muindisi purporting to represent Atish, and by a Mr Patrick Chihwayi ("Patrick") representing the Hardware.

5. The lawyers also discovered that the agreement of sale was drafted by Mr F M Katsande ("Katsande") of Messrs F M Katsande & Partners, the Hardware's lawyers, and that Katsande signed the agreement of sale as a witness.

6. The search at the Deeds Registry established that the transfer of the stand from Atish to the Hardware had been facilitated by a default judgment obtained by the Hardware against Atish on 3 September 2003 in case no. HC 6950/2003, in which the High Court ordered that:

> "(a) within 10 (ten) days of service of this order on the respondent it shall deliver the documents necessary to enable Messrs Coghlan, Welsh & Guest, legal practitioners,

to pass transfer of Stand 17027, Graniteside, Harare, to the applicant, failing which the Deputy Sheriff is hereby directed to procure and sign such documents as may be necessary to enable the conveyancers (to) pass transfer to the applicant.

(b) The respondent shall pay the costs of this application."

7. On 21 September 2005 Atish commenced a civil action in the High Court (case no. HC 4738/2005) against the Hardware, Muindisi, Patrick and the Registrar of Deeds, seeking, *inter alia*, an order nullifying the sale and transfer of the stand to the Hardware.

8. On 23 September 2005 Atish filed a court application in the High Court (case no. HC 4809/2005) against Patrick, the Hardware and the Registrar of Deeds, seeking an interdict restraining the Hardware from disposing of the stand pending the finalisation of case no. HC 4738/2005. The interdict was subsequently granted on 12 January 2006.

9. On 7 March 2006 a pre-trial conference was held in case no. HC 4738/2005. At that conference the Hardware sought leave to amend its plea in order to allege that Atish could not secure the nullification of the sale and transfer of the stand to the Hardware unless the default judgment granted against Atish on 3 September 2003 had been rescinded. That amendment was granted with the consent of both parties.

10. Consequently, on 6 April 2006, Atish filed a court application in the High Court (case no. HC 1998/2006), seeking an order condoning the delay in

filing the application for the rescission of the default judgment, and setting aside the default judgment. That relief was granted by the High Court on 13 July 2006.

Aggrieved by that result, the Hardware appealed to this Court.

There are three main issues to determine in this appeal.

The first issue is whether the default judgment granted in favour of the Hardware in case no. HC 6950/2003 on 3 September 2003 was properly granted. I do not think it was.

I say so because the service of the court application on Atish in case no. HC 6950/2003 did not comply with the provisions of r 39(2)(d) of the High Court rules, 1971 ("the Rules"), which reads as follows:

> "Subject to this Order, process other than process referred to in subrule (1) may be served upon a person in any of the following ways –
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> (a) – (c) …;
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> (d) in the case of process to served on a body corporate -
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> (i) by delivery to a responsible person at the body corporate's place of business or registered office; or
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> (ii) if it is not possible to serve the process in terms of subparagraph (i), by delivery to a director or to the secretary or public officer of the body corporate."

The certificate of service filed in case no. HC 6950/2003 as proof of the service of the court application upon Atish reads as follows:

> "I, Francis Munetsi Katsande, the Legal Practitioner of record for the applicant, do hereby certify that on the 5th day of August 2003, at 1628 hours, at the offices of Attish (*sic*) Investments (Pvt) Ltd, Stand 17021, Sande Crescent, Graniteside, Harare, for the respondent, I served the following document:
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> Court Application
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> By handing it to the Director, Mr Muindisi."

In my view, it is clear from the record that Muindisi was not a director, secretary or public officer of Atish. On the contrary, he was a fraudster. In addition, if the court application was handed to Muindisi, as the certificate of service alleges, it was not handed to "a responsible person at the body corporate's place of business or registered office".

Mukesh Patel ("Patel"), a director of Atish, who deposed to the founding affidavit in this case, vehemently denied that Muindisi was a director of Atish and that Atish had offices at Stand 17021, Sande Crescent, Graniteside, Harare.

In para 23 of the founding affidavit Patel averred as follows:

> "After the respondent (i.e. the Hardware) filed the court application, it proceeded to obtain a default judgment by fraudulent means, more particularly in that –
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> 23.1 The court application was never served upon the applicant (i.e. Atish). A purported Certificate of Service signed by Mr F M Katsande on 26 August 2003, contained false and misleading information more particularly that -
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> (a) the applicant never had any offices at Stand 17021, Sande Crescent, Graniteside, Harare, but Mr Katsande stated and certified that the applicant had offices at the stand.

(b) Mr James Muindisi is not a director of the applicant and did not claim to be such in all his correspondence with the respondent, but Mr F M Katsande stated and certified in the Certificate of Service that he had handed a copy of the court application 'to the Director, Mr Muindisi'. …

23.2 If the court application had been properly served upon the applicant the default judgment could not have been granted."

It is pertinent to note that the averments made by Patel in para 23 of the founding affidavit were not denied by the Hardware in its opposing affidavit. What that means is that the averments were admitted by the Hardware.

As McNALLY JA said in *Fawcett Security Operations (Pvt) Ltd v Director of Customs and Excise and Ors* 1993 (2) ZLR 121 (S) at 127F:

> "The simple rule of law is that what is not denied in affidavits must be taken to be admitted."

In the circumstances, the court application in case no. HC 6950/2003 was not served upon Atish and, consequently, the default judgment granted on 3 September 2003 should not have been granted.

Before dealing with the second issue in this appeal, I wish to state that in view of the fact that Patel alleged that the certificate of service prepared and signed by Katsande contained false and misleading information it was undesirable for Katsande to appear for the Hardware in the High Court and in this Court. Instead, Katsande should have filed an affidavit explaining the rôle he played in the matter.

Having said that, I now proceed to consider the second issue in the appeal, which is whether the provisions of r 63 of the Rules apply to the rescission of the default judgment granted on 3 September 2003 in case no. HC 6950/2003. I do not think they do.

The rule reads as follows:

> "63 (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.
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> (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."

In my view, the provisions of this rule only apply to the rescission of a default judgment given "under these rules or under any other law". They would not apply to the rescission of a default judgment obtained fraudulently or improperly, such as the one granted in favour of the Hardware in case no. HC 6950/2003, because such a default judgment could not be described as a default judgment granted "under these rules or under any other law".

Consequently, there was no requirement on the part of Atish to seek condonation of the delay in filing the court application for the rescission of the default judgment granted against it in case no. HC 6950/2003.

I now come to the third and final issue to be considered in this appeal, which is whether Atish established a basis for the rescission of the default judgment in terms of the common law. I have no doubt in my mind that it did.

The principles applicable in determining this issue were set out by MILLER JA in *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) at 764I-765C as follows:

> "The appellant's claim for rescission of the judgment … must be considered in terms of the common law, which empowers the Court to rescind a judgment obtained on default of appearance, provided sufficient cause therefor has been shown. (See *De Wet and Ors v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1042, and *Childerly Estate Stores v Standard Bank of SA Ltd* 1924 OPD 163). The term 'sufficient cause' (or 'good cause') defies precise or comprehensive definition, for many and various factors require to be considered. (See *Cairn's Executors v Gaarn* 1912 AD 181 at 186 per INNES JA). But it is clear that in principle and in the long-standing practice of our Courts two essential elements of 'sufficient cause' for rescission of a judgment by default are:
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> (i) that the party seeking relief must present a reasonable and acceptable explanation for his default; and
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> (ii) that on the merits such party has a *bona fide* defence which, *prima facie*, carries some prospect of success. (*De Wet's* case *supra* at 1042; *P E Bosman Transport Works Committee and Ors v Piet Bosman Transport (Pty) Ltd* 1980 (4) SA 794 (A); *Smith NO v Brummer NO and Anor; Smith NO v Brummer* 1954 (3) SA 352 (O) at 357-8)."

Applying the test set out above, I am satisfied that both essential elements of "sufficient cause" for the rescission of the default judgment granted in case no. HC 6950/2003 were established by Atish.

With regard to the first essential element, Atish presented a reasonable and acceptable explanation for its failure to oppose the court application. The explanation

was that the court application had not been served upon it by Katsande, and that Muindisi, upon whom the court application was allegedly served, was not a director, secretary or public officer of Atish.

On the merits, the defence raised by Atish was that the stand had been fraudulently sold to the Hardware by Muindisi. In my view, the defence appears *bona fide* and carries some prospect of success.

In the circumstances, the appeal is devoid of merit and is dismissed with costs.

CHEDA JA: I agree

MALABA JA: I agree

F M Katsande & Partners, appellant's legal practitioners

Mushuma Law Chambers, respondent's legal practitioners