

CITY OF HARARE
versus
CHENGETA LAW CHAMBERS
and
TAFARA INFRASTRUCTURE DEVELOPMENT CONSORTIUM

HIGH COURT OF ZIMBABWE
MIUNGWARI J
HARARE, 14 October 2022 and 8 February 2023

Opposed Application

A Moyo, for applicant
P Mufunda, for respondents

MUNGWARI J: On 25 November 2020 in case number HC 5833/20 MUSHORE J granted an order in favour of the respondents in this application. The order was obtained in default of the applicant. Aggrieved by the turn of events, the applicant on 16 June 2022 filed an application seeking the rescission of that judgment. A simple calculation of the time lag between the date when the judgment was issued and the time when the application for rescission of the judgment was filed shows a delay of one and a half years. The default judgment in issue reads as follows:

“IT IS ORDERED THAT:

The residential stands on Plan TPX/ER/1344/2 Mabvuku measuring 200 square metres (a)13518 (b)13520 (c)13521 (d) 13522 (e) 13523 (f)13538 (g)13541 (h) 13542 (i)13543 (j)13544 (k) 13545 (l) 13551 (m) 13552 now belong to Chengeta and Mufunda Law Chambers.”

FACTUAL BACKGROUND

The uncontentious facts are that, the first respondent is the second respondent’s legal practitioners. From the year 2017 right through to the material time the first respondent handled the second respondent’s legal matters. In the year 2019, it became apparent to the first respondent that second respondent was struggling to pay its legal fees. The parties subsequently entered into a memorandum of agreement, in terms of which the second respondent surrendered 13 stands to the first respondent as a guarantee for the payment of the outstanding legal fees. Despite promises to pay, the second respondent failed to deliver. This motivated the first respondent to file a court application for a declaratur under case number 5833/20 by which it sought an order that the 13 stands be declared to belong to Chengeta and Mufunda Law

Chambers. In that application the applicant and the second respondent were the respondents. The application under HC 5833/20 was unopposed by both respondents resulting in the default judgment being granted on 25 November 2020.

In the present application, the applicant contends that it only became aware of the default judgment on 6 June 2022. Dissatisfied with the default judgment, the applicant then filed the present court application for its rescission.

THE APPLICANT'S CASE

The Applicant's case was founded on an affidavit deposed to by one Phakamile Mabena (hereinafter called Mabhena). He is the applicant's Acting Town Clerk. He purports to be duly authorised to depose to the affidavit by virtue of the Urban Councils Act [*Chapter 29:15*] The essence of his deposition was to affirm applicant's keenness to champion its interest in case number HC 5833/20. Mabhena explained that the default judgment was a result of a number of developments that occurred at the applicant's workplace during the relevant period. Firstly, he alleged that the court application though duly received by the applicant was misfiled by one Mr Leeroy Mudziwepasi, a legal officer in the employ of the applicant. The court application was only known to Mudziwepasi as it was not recorded nor actioned. It was also not referred to the relevant Department of Housing for instructions. Thereafter, Mudziwepasi left employment. The applicant only became aware of the court order on 6 June 2022 when Alice Zeure another legal officer stumbled upon the court application in one of the files containing council minutes. Upon further enquiry it was discovered that the court application was not responded to even though it was duly served upon the applicant.

In para. 11 of the founding affidavit the deponent stated the following:

"The Applicant only became aware of the court order under case number HC 5833/20 on the 6th of June 2022 when a legal officer by the name Alice Zeure came across the application in one of the files that had nothing to do with litigation but containing council minutes."

In para. 15 he adds the following:

"The applicant only became aware of the default judgment recently, on or about the 20th of May 2022 when a legal officer by the name Alice Zeure came across the application in the council minutes files that used to belong to Mudziwepasi but were handed over to her for custody upon Mudziwepasi's departure."

Alice Zeure herself stated in her supporting affidavit:

"I only became aware of the court application under HC 5833/20 when I was going through a file that contains council minutes, which was one of the files under Mudziwepasi's custody which file has nothing to do with litigation on or about the 6th of June 2022, which showed that the court application was misfiled."

The dates are clearly mixed up. I will return to the issue later in the judgment.

The allegation by the applicant is essentially that it was the misfiling of the court application by Mudziwepasi which resulted in the applicant failing to defend the application in HC5833/20 resulting in judgment being granted in default on 25 November 2020. Granted a supporting affidavit was deposed to by Alice Zeure but strangely and curiously apart from baldly stating that Mudziwepasi had left employment there is no explanation why he could not depose to an affidavit detailing what he knew about the application and to clarify the circumstances surrounding the misfiling of the application leading to the default judgment.

In addition to explaining the cause of default and the applicant`s sincerity in making this application, Mabhena also referred to the strength of the applicant`s defence in the main matter. He said the applicant being a local authority and not the second respondent is seized with the duty to allocate stands. The 13 stands that were offered to the first respondent by the second respondent belong to individuals on the local authority`s housing waiting list. They could not be allocated to the first respondent which is a law firm.

The applicant further averred that it has a duty to ensure that members of the public on the housing list are allocated land as and when it is available. The allocation of the stands to the first respondent was therefore an illegality.

The applicant also argued that the first respondent being a law firm could not have been awarded residential stands as compensation for legal services because that was in contravention of the Law Society regulations which stipulated that legal fees cannot to be paid in kind. As a result, the default judgment is in effect an illegal court order.

THE RESPONDENTS' CONTENTION

In his opposing affidavit, *Peter Mufunda* on behalf of both respondents argued that: Phakamile Mabhena could not depose to an affidavit purporting to be duly authorised to represent the applicant. In any case Phakamile and Alice Zeure both tendered inadmissible hearsay evidence as they were never at any time involved in the matter and the issues before the court.

As a result of this the respondent contended that there was no application before this court. He went to the extent of accusing the two of lying under oath. His basis for that abrasive allegation was that the certificate of service that was tendered as evidence proved that the applicant was served with a copy of the court order in HC 5833/20 on 16 December 2020. It was received by one P. Mutamba an employee of the applicant in its legal division. He was adamant that the applicant was in wilful default as the matter did not only start and end with

Mudziwepasi's alleged dereliction of his mandate through the alleged misfiling of the court application.

A further accusation was that the applicant had on the 27 April 2021, in the aftermath of the default judgment, convened a meeting in the presence of a Mr Bare its housing director, Mr Madhumo a housing officer and a representative of second respondent Mr Chakandiwana. The default judgment in HC 5833/20, was one of the issues discussed at that meeting. It was therefore a misrepresentation by the applicant to state that its housing department was not aware of the default judgment. The facts on the ground showed that it was aware from as early as 27 April 2021. To prove their allegations the respondents attached a copy of the applicant's housing department minutes and the supporting affidavit of Mr Charles Chakandiwana. In that affidavit, Charles Chakandiwana stated that on the day of the meeting he carried copies of the court order and found the applicant's representatives with their own copies. They then discussed the issue of the order of HC 5833/20 amongst other issues.

At para. 24 of Mufunda's affidavit, the respondents took great exception to the fact that there was an inordinate delay in making the application for rescission. Loosely translated, the respondent contended that the application was improperly before this court. A delay of one year and six months required condonation before any such application could be filed.

Although not elegantly stated it was clear that the respondents were raising two preliminary objections, namely that the applicant had no authority to depose to the founding affidavit and that the application was filed out of time, without condonation having been granted. I will first deal with the allegation that the application was filed out of time as I believe it is dispositive of the matter.

APPLICATION FILED OUT OF TIME

Applications for default judgment are regulated in terms of r 27 of the High Court Rules, 2021. It provides that:

27. (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, and thereafter the rules of court relating to the filing of opposition, heads of argument and the set down of opposed matters, if opposed, shall apply.

(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 the action, on such terms as to costs and otherwise as the court considers just."

The rule speaks to two critical issues. Firstly, that a party against whom default judgment has been entered has not more than one month after he/she/it has knowledge of the judgment to apply for its rescission if he/she/it wishes to do so. Secondly that this court can set aside any judgment entered in default if satisfied that there is good and sufficient cause. Obviously, the second consideration only arises if the application has been filed within the time prescribed by r 27 or if the applicant has sought and has been granted condonation to file the application outside the prescribed time frames.

As already indicated, it was the respondents' contention that the application for rescission of judgment was filed outside the time stipulated in the High Court Rules, 2021. The applicant was required to first seek condonation before filing the present application. The respondents were adamant that whilst the applicant wanted the court to believe that the court application that was served on it on 15 October 2020 was misfiled by Mudziwepasi it remained silent in relation to the subsequent court order which was served upon it on 16 December 2020. Not only did the applicant receive a copy of the court application in HC 5833/20 but it was also served with a copy of the court order on 16 December 2020. The respondents urged the court to find that the applicant had lied under oath in order to bring this application within the mandatory thirty-day period of knowledge of judgment required by r 27.

In its answering affidavit, the applicant did not address the issue directly but merely stated that it only became aware of the court order in issue, on 6 June 2022. It is trite that he who alleges must prove. The case of *Wonder Simuka v Montana case meats* SC 51/21 is instructive in this regard. The respondents furnished proof in the form of the certificate of service in Annexure 7 as well as a letter authored by itself on 15 December 2020 addressed to the applicant in Annexure 6 of the notice of opposition. A reading of these annexures shows that receipt of the letter was acknowledged by the applicant's employee in the legal department, in particular it was received by a certain P Matamba at 3.52 pm. In the letter the respondents notified the applicant of the court order and even attached a copy of the same for their attention.

Ordinarily, a certificate of service is always accompanied by proof of its service which is returned to the serving legal practitioner. The question is why this return could not be furnished by the applicant, if it disproved the claims made in the opposing affidavit. As matters stand, the return of service of the court order, confirms that service was effected on P Matamba on 16 December 2020.

The material dates indicated in the applicant's founding affidavit are mixed up. As illustrated earlier Mabhena gave two irreconcilable dates in his attempt to explain the discovery

of the default judgment in one affidavit. In para. 11 he states authoritatively, that the discovery was made by Alice Zeure on 6 June 2022 yet in para. 15 he alludes to the same discovery having been made on 20 May 2022. The applicant does not in any way explain the different dates.

Recently the Supreme Court in the case of *Central African Building Society v Finormagg Consultancy (Private) Limited & Anor* SC 56/22 restated the old age principle that an application stands or falls on its founding affidavit as follows:

“It is trite that an application stands or falls on its founding affidavit. The founding affidavit sets out the case that a respondent is called upon to answer. The principle was aptly set out in *Austerlands (Pvt) v Trade & Investment Bank Limited & Ors* SC 92-05. CHIDYAUSIKU CJ remarked at p 8 as follows:

“The general rule has been laid down in this regard is that an application stands or falls on its founding affidavit and the facts alleged in it. This is how it should be, because the founding affidavit informs the respondent of the case against the respondent that the respondent must meet. The founding affidavit sets out the facts which the respondent is called upon to affirm or deny.”

In casu the applicant gave two different dates as dates on which it made the discovery of the default judgment. The mixed dates on which the judgment came to the applicant’s knowledge supports the respondents’ contention that by those dates the applicant was well aware that there was a court order against it. The conflicting and inconsistent explanations in the founding affidavit are frowned upon. The bona fides of a party to application proceedings cannot be overemphasized given that the averments in the affidavits constitute the evidence which the court ought to rely on. A party who deliberately misleads the court deserves to be censured. As such the court is at liberty to draw adverse inferences from that misrepresentation.

As if the above discord was not damning enough on its cause, the applicant omitted to realise that the allegation that the discovery was made on 6 June 2022 was not stated as such by Alice Zeure. Zeure swore that she discovered the court application. Nowhere in her affidavit does she state that she discovered the default judgment as *Mabhena* alleges in para. 11 of his affidavit. Zeure was not sure even in relation to that application because she alleges having made the discovery on or about 6 June 2022. In light of all that conflicting evidence, the court is left hanging in relation to when the applicant learnt of the application and the subsequent default judgment. I am persuaded to accept the respondents’ contention that the applicant learnt of the judgment earlier than 6 June 2022. I am fortified in this view by the fact that while the applicant states that a copy of the court application was misfiled the issue of the default order that was served upon it on 16 December 2020 was not addressed in its answering affidavit. Was it also misfiled by Mudziwepasi? If it was indeed misfiled together with the court

application and was discovered on the same day, then what other further inquiries would the applicant have had to make in the face of such unassailable evidence of dereliction of duty by its employee. To compound its woes, the applicant did not bother to have Mudziwepasi file an affidavit explaining those issues. The respondents alleged that Mudziwepasi is a lawyer. He is therefore easily locatable through the Law Society a body corporate which is the regulatory authority for all registered legal practitioners. That evidence was not refuted by the applicant. Worse still, the court was never informed of the efforts if any that were made by the applicant to secure an affidavit from Mudziwepasi confirming the misfiling of the application and the default judgment. All that the applicant said was that Mudziwepasi has since left its employment and as such was unable to depose to a supporting affidavit to clarify the circumstances surrounding the misfiling of the application leading to the default judgment. The same Mudziwepasi would have taken the court into his confidence and explained whether there was a discussion of the court order of HC5833/20 on 27 April 2021 when the applicant convened a meeting with representatives from its Housing Department in the presence of Mudziwepasi and Mr Charles Chakandiwana, a representative of the second respondent

In the final analysis the court cannot agree with the applicant's averment that it discovered the existence of the court order on 6 June 2022. I find it as a fact that the applicant was served with a copy of the court order on 16 December 2020 and got to know of the default judgment at that time. Its application for rescission of judgment is therefore hopelessly out of time. Having noted that the application was being sought to be filed one and half years beyond the prescribed time limits, the logical step was for the applicant to seek condonation to be allowed to institute the rescission out of time. It did not deem that route necessary.

Given the above circumstances and all the issues which militate against the success of the application I must as I hereby do uphold the respondents' preliminary objection that the application was filed out of time.

As already indicated, this point alone disposes of the application. I therefore find it unnecessary to discuss the other objection relating to the inadequacies of the founding affidavit raised by the respondents.

Consequently, IT IS ORDERED THAT:

“The application be and is hereby struck off the roll with costs.”

Gambe Law Group, applicant`s legal practitioners
Chengeta Law Chambers, first respondent`s legal practitioners