

**FOUNDATION COLLEGE  
Versus  
SIMBARASHE MOYO & 12 OTHERS**

**HC 2893/19**

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Versus  
SIMBARASHE MOYO & 12 OTHERS  
And  
THE DEPUTY SHERIFF**

**HC 2902/19**

IN THE HIGH COURT OF ZIMBABWE  
MAKONESE J  
BULAWAYO 2 AND 10 JUNE 2021

### **Opposed Application**

*Miss Q Chimbo*, for the applicant  
*B Phakathi*, for the respondents

**MAKONESE J:** This is an application for rescission of judgment and application for stay of execution. I have combined the two applications for convenience. They concern the same parties and the circumstances arise from the same subject matter. The application is opposed by the respondents. The 12 respondents nominated one Bishop Phakathi to represent them all.

### **Factual Background**

The respondents are former employees of the applicant. Sometime in March 2018 the Labour Court made an award for payment of arrear wages in favour of the respondents in the sum of \$52 658.00. In compliance with the order applicant made full payment of the arrears in terms of the Labour Court judgment. Applicant has furnished proof of payment of the various sums of money paid into individual accounts of the respondents by way of electronic transfers. In spite of these payments respondents went on to make an application for registration of the Labour Court judgment with this court. This court registered the order of the Labour Court per TAKUVA J on the 8<sup>th</sup> of August 2019. The judgment was entered in default as an ordinary chamber application. It is apparent that the application for default judgment was not served on the applicants. There is no proof of service of the chamber application on record. The respondents have not availed such proof of service. On 28<sup>th</sup> November 2019 a Warrant of Execution against applicant's property was issued. Various items of movable property were placed under execution pending removal for sale. Applicant

maintains that it was not in wilful default. In any event, proof has been placed before the court to show that various payments were made into the respondents' individual accounts. Respondents stubbornly insist on execution and argue that payment should have been made in United States Dollars. The judgment of the Labour Court does not sound in United States Dollars. When the Labour Court judgment was registered with this court the amounts due were denominated in Zimbabwe Dollars. Respondents' assertion that they ought to have been paid in foreign currency has no legal or factual basis.

### **REQUIREMENTS FOR RESCISSION OF JUDGEMENT**

The onus is on the applicant to show that there is good and sufficient cause for the court to set aside the judgment. In *Stockil v Griffiths* 1992 (1) ZLR 172 (S) the court aptly observed as follows at page 173 D-F.

*“The factors which a court will take into account in determining whether an applicant for rescission has discharged the onus of proving “good and sufficient cause”, as required to be shown by Rule 63 of the High Court Rules, 1971 are well established. They have been discussed and applied in many decided cases in this country. See for instance, Barclays Bank of Zimbabwe v CC International (Pvt) Ltd 5-16-86 (not reported); Roland & Anor v McDonnell 1986 (2) ZLR 216 (S); Songore v Olivine Industries (Pvt) Ltd 1988 (2) ZLR 210 (S) at 211 C-F. They are: (i) the reasonableness of the applicant's explanation for the default; (ii) the bona fides of the application to rescind the judgment and (iii) the bona fides of the defence on the merits of the case which carries some prospects of success. These factors must be considered not only individually but in conjunction with one another and with the application as a whole.”*

What emerges from a plethora of decided cases is that the term “good and sufficient cause” has been interpreted to mean that for one to succeed in an application for rescission of judgment one must satisfy the following factors:

- (i) The explanation for the reason for the default must be reasonable.
- (ii) The *bona fides* of the application for rescission of the judgment.
- (iii) The *bona fides* on the merits of the case which carries some prospects of success.

On the facts of this matter, a reasonable explanation has been tendered. The Chamber Application was evidently not served on the applicant. The applicant alleges that full payment in accordance with the Labour Court judgment was made. The respondents failed to dispute the documentary proof in the form of various telegraphic transfers made into the respondents' accounts. If the indebtedness has been discharged then the more reason there is

for default judgment to be set aside and the stay of execution to be granted. Applicant submits that they only learnt that judgment had been entered against them in default in respect of a claim they had settled when a Notice of Attachment from the Deputy Sheriff was served on them on 28<sup>th</sup> November 2019.

It is settled that wilful default only occurs when a party with knowledge of court process chooses to ignore the same. In the present matter it cannot be said that applicant wilfully refrained from acting to protect its interests. No certificate of service was produced to indicate that applicant was aware of the Chamber Application. In the circumstances an application for rescission of judgment is merited.

For the foregoing reasons, and in the result the following order is made:

1. The application for rescission of judgment under case number HC 1433/19 be and is hereby granted.
2. The applicant shall file its notice of opposition within 10 days of the date of this order.
3. Execution of judgment under case No. HC 1433/19 be and is hereby permanently stayed.
4. There shall be no order as to costs.

*Messrs T Hara and Partners*, applicant's legal practitioners