HUMBLE ENTERPRISES (PVT) LTD
Versus
THE TRUSTEES FOR THE TIME BEING OF PETER MANJENGWA FAMILY TRUST
And
CHITUNGWIZA MUNICIPALITY

HIGH COURT OF ZIMBABWE
CHILIMBE J
HARARE 6 & 7 October 2022

Adv *Chirambwe*-for applicant
Mr.T. *Tabana*-for first respondent
No appearance for third respondent

Application for rescission of judgment.

CHILIMBE J

BACKGROUND

[1] Applicant seeks the rescission of a judgment of this court, per MANGOTA J, taken in default on 22 March 2022 in case number HC 3823/21. (This order was subsequently amended to address patent errors on 12 April 2022). The judgment related to a dispute over a piece of land located in Chitungwiza. Case number HC 3823/21 commenced as an urgent application resulting in an interim order on 20 July 2021 per CHITAPI J. The order issued (a) certain case management directions to the parties, (b) instructed third respondent to furnish a reportion the piece of land in question and (c), postponed the matter to 28 July 2021 for a hearing. The matter further postponed on that and subsequent dates as parties attended to the filing of opposing and answering papers, together with the heads of argument. Eventually, the hearing date was fixed for 22 March 2022.For reasons set out herein, applicant did not appear on the day. Judgment was obtained against it in default, and the following order issued as subsequently amended; -

> "It is ordered that
>
> Applicant is the owner of stand number 16675 Zengeza 4, Chitungwiza.

> The respondent be and is hereby interdicted from carrying out any construction work or development at stand 16675 Zengeza 4 Chitungwiza.
>
> The respondent to pay the cost of this application on a higher scale as between legal practitioner and client."

THE AFFIDAVIT OF JOMUKINYATA CHRISTOPHER CHIBWE.

[2] Applicant`s case was founded on the affidavit deposed to by one Jomukinyata Christopher Mabwe ("Jomukinyata"). Jomukinyata` s designation was unstated but he was nonetheless, duly authorised. The essence of his deposition was to affirm applicant`s keenness to champion its interest in case number HC 3823/21. Jomukinyata explained that the default judgment was a result of a number of developments at applicant`s erstwhile legal practitioners commencing with the sad event of the firm`s principal Mr. Manyurureni` s passing away. Thereafter, the legal practitioner handling their matter, Mr. Joseph Nemaisa left the firm on 1 February 2022 to join Mambosasa Legal Practitioners. Meanwhile, his old firm, apparently based in Harare, was placed under the curatorship of Mr. Bonongwe, a legal practitioner based in Mt. Darwin.

[3] This transition essentially resulted in Messrs Manyurureni legal firm defaulting at the hearing of 22 March 2022. Supporting affidavits were deposed to by Mr. Nemaisa and a Bryson Simango, an intern at Manyurureni at the relevant time. These two affidavits in my view convey two things (a) that the failure to attend court on 22 March 2022 was authored by the law firm and that (b) the intern pleaded ordinary inadvertence if not a form of misfortune for their failure to attend court. The intern stated that he paid insufficient attention to the notice of set down informing of the 22 March 2022 hearing date. Quite clearly, from his affidavit, the intern`s focus was directed more toward his impending examinations whose summons he proceeded to answer by leaving work around the time. Noteworthy again, is that the firm`s principal was now Mr. Bonongwe, who was based in Mt. Darwin.

[4] Apart from explaining the cause of default and applicant`s general sincerity in making this application, Jomukinyata also adverted to the cogency of applicant `s defence in the main matter. Firstly, applicant's claim to the disputed piece of land was buoyed the fact that he had acquired it through a confirmed sale in execution. Secondly, first respondent was guilty of material non-disclosure of the circumstances behind the acquisition of the stand and in particular, the irregularities affecting its creation. Thirdly, Jomukinyata stated that the main

application was afflicted by fatal misjoinder in that certain person central to the dispute, being Rinnex Investments and one Patrick Kombayi Vudzi, were not cited in the proceedings.

[5] Jomikinyata`s deposition, together with those of Messrs Nemaisa and Simango were attacked in the opposing affidavit. First respondent was adamant that applicant was in wilful default as and that its former legal practitioners had been derelict of mandate. In his submissions, Mr. *Tabana* for first respondent was both bold and persistent in his accusations that the three deponents had lied under oath. The basis for such unsettling allegation was apparently the notice of set down which counsel averred may not have been received by the intern as claimed.

"GOOD AND SUFFICIENT CAUSE"

[6] In *Peter Valentine v Mydale International Marketing (Pvt) Ltd & Anor HH 233-17*, CHITAKUNYE J (as he then was) navigated the key principles and leading authorities relating to applications for rescission of judgment. The court cited with approval, GUBBAY CJ in *Stockil* v *Griffiths* 1992 (1) ZLR 172(S) where the learned former Chief Justice defined the concept of "*good and sufficient cause*" which an applicant is required to demonstrate in order to qualify for rescission of judgment. Importantly, CHITAKUNYE J had recourse, in the same decision, to the caution sounded by MACNALLY JA in *Deweras Farm* (*Pvt*) *Ltd & Ors* v *Zimbabwe Banking Corp Ltd* 1998 (1) ZLR 368(S). In *Deweras*, the court emphasised that "good and sufficient cause" was a nothing but principle buttressing the court`s discretionary function and authority in applications for rescission of judgment. As such, it would be improper to adopt a restrictive definition or approach when considering what constituted "good and sufficient cause".

[7] In same vein, the court in *Peter Valentine*, also identified the three requirements which articulated what good and sufficient cause amounted to. These three components were (a) the explanation for the reason for the default must be reasonable; (b) the bona fide of the application to rescind the judgement and (c) the bona fide of the defence on the merits of the case which has some prospects of success. The court proceed to deal with how to balance these three requirements in the process of establishing if indeed good and sufficient cause had been shown by an applicant. An applicant`s explanation for their default entailed demonstrating that the party was not in "wilful default". In In *Zimbabwe Banking Corp. Ltd* v *Masendeke* 1995(2) ZLR 400(S), again cited with favour in *Peter Valentine*, wilful default was defined as occurring

when a party, well aware of a set down date, and unfettered by compelling circumstance, deliberately elected not appear.

THE BURDEN AND STANDARD OF PROOF

[8] It is a trite position in law that in motion proceedings, a party must, whether promoting or repelling a causa, make up a plausible case on the papers. In applications for rescission of judgment, a court must have regard that it is faced with the critical question of whether a reprieve may be extended to a party unjustly landed with a judgment against it, to reopen a case and then delve into the intricacies of the merits. The standard of proof required must accordingly reflect this consideration. This is the very approach that gave birth to the dicta, guidance and principles issued in the authorities cited in *Peter Valentine*.

[9] At the same time, the authorities have prescribed the role, duty and culpability of legal practitioners in the prosecution of their clients` matters. Particularly so where dereliction is alleged. The courts have laid out two requirements (a) the duty of a legal practitioner to account for any default or defect emanating from their province[1] and (b) an evaluation of such explanation based on the circumstances of the matter[2].

[10] There was some argument from counsel as regards who carried the burden to prove on whom the notice of set down was served. Both counsels traded the phrase "he who alleges must prove" rather liberally. Applicant stated that the notice was served and processed by the intern. The intern confirmed that position. First respondent disputed it and argued that proof be furnished in the form of the notice itself as well as the register in which it was entered. Simango`s affidavit neither attached the notice of set down nor an extract from the reception register of incoming process. In similar vein, a notice of set down is always accompanied by proof of its service which is returned to the serving legal practitioner. Why could this return not be furnished by respondent, if it gave indications contrary to claims made in the founding and supporting affidavits? As matters stand, the return of service of the notice of set down serial number 238240 B, confirms that service was served on Simango on 14 March 202.

[1] *United Refineries v The MIPF & 3 Ors SC 63-14* and *Dombo Chibanda & 2 Ors v City of Harare SC 83-21*
[2] *Saloojee & Anor v Minister of Community Development 1965 (2) SA 135 (AD); Kawondera v Mandebvu 2006 (1) 110 (S); Tamanikwa & Anor v Zimdef & Anor SC 73-17; Vengesai and Others v Zimbabwe Glass Industries Limited 1998 (2) ZLR 589.*

APPLICATION OF THE LAW TO THE FACTS

[11] Having regard to the foregoing facts and legal principles, I have no hesitation in accepting that applicant`s explanation meets the "good and sufficient cause" standard prescribed in *Peter Valentine*. Explanations have been tendered on oath, not by anyone, but by a legal practitioner and his former intern at a law firm that there was oversight. Those explanations are not unreasonable. Occasional inadvertence is unfortunately, a stubborn, regrettable and but seemingly inherent aspect of legal practice. There is no basis, despite spirited submissions to such effect, to conclude that these two deponents misled the court in the explanations they tendered. The only learning to draw from this altruism on inadvertence is that legal practitioners and their clients must not take comfort from it. The standard of management of cases as well as administration of justice continue to evolve and the day is nigh when even such explanations will be rightly dismissed as inexcusable evidence of poor service. I do recognise further, that applicant and its legal practitioners had, up to the point of default, demonstrated every intention to defend the cause brought against them. This matter had seen its own fair share of twists and turns, postponements and adjournments' as well as case management instructions. Applicants had observed, adhered and complied with all such. There is justification for the conclusion that applicant was not in wilful default and neither is present application driven by mala fides.

[12] As regards the bona fides of the defence, I note that counsel for first respondent tended to dig the plough deeper in his consideration of the indicative defence tendered. That is not the appropriate standard. In so concluding, one may state that aspects of the defence tendered by applicant resonated with averments by first respondent itself on the irregularities regarding creation of the stand. The fact that applicant purchased the stand at a judicial sale in execution adds another plausible dimension to the defence. Testing this defence by challenging the quality or validity of that sale become matters for the tribunal trying such facts.

[13] As stated in [10] above, there was disagreement over the issue of onus. Legal practitioners will be well advised by the guidance of GUBBAY CJ in *Musanhi v Mount Darwin Rushinga Co-operative Union 1997 (1) ZLR 120 (S).* The learned Chief Justice tried to decongest complications and quarrels over onus that may arise when parties, as an old Zimbabwean adage says, start throwing the live snake at each other. He held as follows at page 123 B-C; -

> "Counsel for the appellant argued before this court that it is not a rule of our law that the onus of proof cannot lie upon the party who makes a negative allegation.

> It still has to be determined who can be said to assert and who to deny. I agree with that submission. It is not very helpful in my opinion, to ask whether a party is making a positive or negative allegation. This is because by adroit linguistic manipulation a positive averment can always be couched into a negative statement."

[14] The point is merely made that either counsel could have assisted the court by furnishing detail around this purportedly contentious document. I may also mention that applicant did not attach to its papers, a copy of the very order whose rescission they sought. For convenience born of practice and standard, it does assist a great deal when such orders are attached to applications for rescission of judgment as a matter of course. I had to take the trouble of extracting the order from the registry file. In addition, there were sporadic references by both counsel, to other documents forming part of HC 3823/21. One wonders why the necessity of such reference was not anticipated? It would have led to the inclusion of the documents concerned on the papers. Naturally, one would not exactly be required to replicate and attach an entire cuss-referenced record, but selecting only the most essential and non-bulky parts of the record does make sense. It must be agreed that *Mhungu v Mtindi 1986 (2) ZLR 171* did not authorise legal practitioners to habitually send judges over to registries for purposes of retrieving or perusing a document or two which could have, with ease, been extracted and attached to the papers.

DISPOSITION

I am satisfied that applicant has shown good and sufficient cause and is entitled to have the judgment entered against it rescinded. Whilst a favourable order of costs would normally follow applicant as the successful party, I do not believe first respondent should be burdened with the consequences of inadvertence issuing from applicants` legal practitioners` office. As such, let each party bear its own costs.

It is accordingly ordered that; -

1. The application for rescission of judgment be and is hereby granted.
2. The default judgment entered by this court in case number HC 3823/21, on 22 March 2022 and as subsequently amended on 12 April 2022, be and is hereby set aside.
3. The parties to progress the matter in terms of the rules.
4. Each party to bear its own costs.

Mambosasa Legal Practitioners-applicant`s legal practitioners
Tabana and Marwa Legal practioners-first respondent`s legal practitioners

CHILIMBE J _____07/10/22