

**QALISA INVESTMENT (PVT) LIMITED**

**APPLICANT**

**VERSUS**

**DIANE MARGARET DRUMMOND**

**RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE  
MATHONSI J  
BULAWAYO 28 SEPTEMBER 2011 AND 6 OCTOBER 2011

*Mr N. Ndlovu* for applicant  
*Mrs H. Makusha Moyo* for respondent

Opposed Application

**MATHONSI J:** These two applications were heard at the same time. Case No. HC 979/10 is an application for condonation of the late filing of an application for rescission of judgment while Case No. HC 980/10 is the application for rescission of judgment. Both applications were filed at the same time on 24 May 2010.

Briefly the facts are that the respondent issued summons against the applicant on 13 June 2003 under Case No. HC 1123/03 in which she sought an order, inter alia, directing the applicant to complete the construction of residential premises on a portion of Bulawayo Golf Club known as Lots 83 and 84 and to transfer the said property to herself in terms of an agreement entered into between the parties on 18 August 2001.

The applicant entered appearance to defend the action but did not file a plea as provided for in the rules of court. Much later in September 2007, the respondent says there was a delay as parties engaged in protracted negotiations for a settlement which did not yield any result, the respondent issued a notice of intention to bar. When the applicant again failed to plead, a bar was effected against the applicant on 19 October 2007.

With the applicant out of court, an application for default judgment was filed on 4 December 2007 and although not obliged to do so, the respondent served that application upon the applicant's legal practitioners on the same date. The applicant did not act upon that

application as well resulting in judgment being entered against the applicant as prayed for in the summons on 19 May 2008.

The court order was served twice upon the applicant firstly on 7 January 2010 and secondly on 17 February 2010. This service did not galvanise the applicant into action and it was not until 24 May 2010 aforesaid, some months after service of the order, that these applications were filed.

In its founding affidavit in HC 979/10, the applicant gave the explanation that the rescission of judgment application could not be filed timeously because when the court order was served and they contacted their legal practitioners, the file could not be located at that firm and no one seemed to know anything about the matter as the legal practitioner who had handled the matter had died. The other reason was that the matter had been dormant for a number of years.

Almost the same explanation was given in Case No. HC 980/10 for the applicant's failure to file a plea and not to act upon the notice of an application for default judgment which was served upon applicant's legal practitioners.

On the prospects of success on the merits, in Case No. HC 980/10, the applicant alluded to this in one brief paragraph. It stated that the respondent breached the agreement by failing to pay in terms of that agreement resulting in its project manager repossessing the property. Nothing about prospects of success is said in HC 979/10.

There are broad factors which a court should take into account in deciding whether to condone a failure to comply with the rules of court. These are:

- (a) that the delay involved was not inordinate, having regard to the circumstances of the case;
- (b) that there is a reasonable explanation for the delay;
- (c) that the prospects of success should the application be granted, are good; and
- (d) the possible prejudice to the other party should the application be granted.

See *Forestry Commission v Moyo* 1997 (1) ZLR 254(S) at 260 C-H and 261A. *Director of Civil Aviation v Hall* 1990 (2) ZLR 354(S) at 357 D-G; *Ncube v CBZ Bank Ltd and Others* HB 99/11 at page 3.

An application for condonation must precede the main application for rescission of judgment. *Sibanda v Ntini* 2002(1) ZLR 264 (S); *Mlondiwa v Regional Director of Education, Midlands Province N.O and Another* HB 19-94 and *Viking Woodwork (Pvt) Ltd v Blue Bells Enterprises (Pvt) Ltd* 1998(2) ZLR 249(S).

In *Viking Woodwork (Pvt) Ltd* (supra) at 251 C-D SANDURA JA stated that a party who finds himself out of time to make an application for rescission must first seek condonation. He said:

“If he does not make the application within that period but wants to make it after the period has expired, he must first of all make an application for condonation of the late filing of the application. This should be done as soon as he realises that he has not complied with the rule. If he does not seek condonation as soon as possible he should give an acceptable explanation, not only for the delay in making the application for the rescission of the default judgment, but also for the delay in seeking condonation.”

Clearly therefore the application for rescission of judgment in HC 980/10 was improperly filed as the late filing had not been condoned. It was therefore improperly before me for that reason.

The court has a discretion to condone non-compliance taking into account the broad factors I have referred to. In *casu*, while the delay itself was not inordinate, the explanation given for the delay is not satisfactory. A party who has been served with a court order cannot sit on it because the legal practitioners have misplaced a file. They could have easily reconstructed another file.

Nothing whatsoever has been said about the prospects of success and I can only assume they do not exist. It is interesting to note that Mr *Ndlovu* for the applicant raised new arguments in his heads of argument and in his address in court which do not appear on the papers. These relate to the allegation that the order granted in favour of the respondent is incapable of performance because the property in dispute has been sold.

In view of the fact that this issue is not contained in the papers, this amounts to leading evidence from the bar which cannot be allowed.

I am therefore unable to condone the late filing of the application for rescission of judgment. Having gone through that application as well it has no prospects of success either. It is however unnecessary for me to deal with it in light of my decision not to condone the non-compliance.

Accordingly the application for condonation in HC 979/10 and the application for rescission of judgment in HC 980/10 are hereby dismissed with costs.

*Messrs Cheda and partners*, applicant's legal practitioners  
*Messrs Webb, Low & Berry*, respondent's legal practitioners