NOREEN SIBANDA **1ST APPLICANT**

AND

BENSON SIYAWAREVA **2ND APPLICANT**

AND

JULIUS MPOSELWA NDLOVU **RESPONDENT**

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 27 JUNE 2011 AND 30 JUNE 2011

Mr Z Ncube for applicants
Ms Mudenda for respondent

Opposed Application

MATHONSI J: In case no. HC 303/07 th Respondent instituted proceedings against the two Applicants in this matter and two others seeking an order for the eviction of the applicants from premises known as 5551 Mkhosana Township Victoria Falls. The action was contested by the applicants.

When that matter eventually came for trial, for some reason the trial could not be completed and it was postponed sine die in May 2010. On 21 July 2010 the Assistant Registrar wrote a letter to *T. Hara and partners*, then the legal practitioners representing the respondent. The letter reads in part as follows:

> "In terms of the provisions of rule 215(2) of the High Court of Zimbabwe Rules 1971, I have allocated the undermentioned dates for hearing of this matter--.
> --
> 2nd-3rd November 2010 at 10:00am. Please lodge a consent set down as soon as possible.
>
> Yours faithfully
> (Signed)
> N. MABUYA
> DEPUTY REGISTRAR"

That letter was copied to *Cheda and Partners* of Bulawayo for the attention of *Mr N. Mlala.*

When the matter first came up for trial on 18 May 2010 *Mr J.F Mudenda* had appeared for the current respondent while *Mr N. Mlala* appeared for the current applicants. On that date the matter was postponed to the following day, that is, 19 May 2010 on which date *Mr J.F Mudenda* again appeared for the respondent while *Ms G. Mahlangu of Dube and partners* of Victoria Falls represented the applicants. Other than the appearance of *Mr N. Mlala of Cheda and partners* to postpone the matter on 18 May 2010 nowhere in the record does the firm of *Cheda and partners* appear as having an interest in the matter at all. For that reason, it is not clear why the Assistant Registrar chose to copy his letter of 21 July 2010 offering trial dates to that firm of legal practitioners.

In addition to that there was no compliance with the directions of the Assistant Registrar to "lodge a consent set down", as the parties did not file any notice of set down at all. The matter still came up for continuation of trial on 2 November 2010 and inevitably the applicants were in default.

At the behest of the respondent's Ndou J entered default judgment against the applicants. It is that judgment which applicants are now seeking to have rescinded. In their rescission of judgment application the applicants state that they were never served with a notice of set down, they were not aware that the matter was coming up for trial on 2 November 2010 and they were therefore not in wilful default.

It has also been stated on behalf of the applicants that even the letter offering 2 November 2010 as a trial date was not brought to their attention, regard being had to the fact that it was addressed to respondent's legal practitioners and copied to *Cheda and Partners* who had no interest whatsoever in the matter. In fact, at that time their legal practitioners were *Dube and Partners* of Victoria Falls who used *Mabhikwa, Hikwa and Nyathi* legal practitioners as their correspondents. *Cheda and partners* had no business with the matter and hence their failure to forward the letter of the Assistant Registrar to the applicants.

Before dealing with the issue of the applicant's default, I propose to touch on the failure by the respondent's legal practitioners to file heads of argument timeously. The applicants' heads of arguments were filed on 3 May 2011 and served on their opponents on 5 May 2011, as appears from the certificate of service filed of record.

That notwithstanding, the respondent's heads of argument were not filed until the day of hearing being 27 June 2011. They should have been filed by close of business on 19 May 2011. This derives from the provisions of Order 32 Rule 238 (2) of the High Court Rules; 1971 which read:

> "(2). Where an application, exception or application to strike out has been set down for hearing in terms of subrule (2) of rule 223 and any respondent is to be represented at the hearing by a legal practitioner, the legal practitioner shall file with the registrar, in accordance with subrule (2a), heads of argument clearly outlining the submissions relied upon by him and setting out the authorities, if any, which he intends to cite, and immediately thereafter he shall deliver a copy of the heads of argument to every other party.
>
> (2a) Heads of argument referred to in subrule (2) shall be filed by the respondent's legal practitioner not more than ten days after the heads of argument of the applicant or excipient, as the case may be, were delivered to the respondent in terms of subrule (1).
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> (2b) Where heads of argument that are required to be filed in terms of subrule (2) are not filed within the period specified in subrule (2a), the respondent concerned shall be barred and the court or judge may deal with the matter on the merits or direct that it be set down for hearing on the unopposed roll."

There can never be a clearer provision of the rules. The respondent is represented by a legal practitioner and should have filed heads of argument as provided for in rule 238(2). He is therefore barred in terms of subrule (2b) of that rule. Quite frequently legal practitioners now pretend that rule on the filing of heads of argument does not exist and file heads of argument as and when they please. This cannot be allowed to continue. Although I agreed to hear *Ms Mudenda* for the respondent in the interest of bringing about progress in this matter which has

spiralled in one place for more than 4 years, this should not be construed as a licence to legal practitioners to flout the rules with reckless abandon. The disregard of the rules has now become fashionable. Legal practitioners should be reminded of the need for a strict adherence to the rules. This is a court governed by its own set of rules which shall forever remain sacrosanct.

I now turn to the inquiry concerning the non-appearance of the applicants on 2 November 2010. In terms of Rule 215, once a matter has been placed on the cause list in terms of rule 214, the registrar is required to allocate a date of hearing and notify the parties of the date. He is not required to do anything further and the matter will be regarded as set down for that date.

In my view, to require the parties to file a consent to the set down, other than it being an extension of the rules, is undesirable as it opens up a pandora's box for parties to contest the court date on the basis that they did not consent to set down. The letter of the Assistant Registrar, to the extent that it required the parties to consent to set down creates a problem.

In terms of Rule 63(2) of the High Court rules, if the court is satisfied on an application that there is good and sufficient cause to do so, it may set aside a judgment that was entered in default. What constitutes "good and sufficient cause" to rescind a judgment has been held to be:

(i) the reasonableness of the Applicant's explanation

(ii) the bona fides of the application to rescind the judgment; and

(iii) the bona fides on the merits of the case which carries some prospects of success.

The foregoing factors are considered in conjunction with each other. *Stockill v Griffiths* 1992(1) ZLR 172(S) at 173 D-F; *Hutchison and Another NNO v Logan* 2001(2) ZLR (H); *Howera v Mudzingwa and Others* HB 123/10.

In the present case clearly the applicants were not served with the notice of set down. They were not aware that they were required to attend court on 2 November 2010. They only became aware of the judgment long after it was granted. On the merits, they have got an arguable case.

I am therefore satisfied that they have shown good and sufficient cause for the

rescission of the default judgment.

Accordingly it is ordered that:

(1) The judgment entered in default on 2 November 2010 be and is hereby rescinded.

(2) The parties are granted leave to apply for fresh dates of trial

(3) The respondent shall bear the costs of this application.

Dube and Partners, applicants' legal practitioners
Messrs Mudenda attorneys, respondent's legal practitioners.