EDWARD MTAMANGIRA

And

CONSTANCE MTAMANGIRA

Versus

NITTA MPOFU

IN THE HIGH COURT OF ZIMBABWE

NDOU J

BULAWAYO 28 JUNE & 12 JULY 2012

N. Dube for the applicants

S. Chamunorwa for the respondent

Opposed Court Application

NDOU J: This is an application for rescission of judgment granted under HC 137/12. The salient facts are the following. Under HC 2757/01 the respondent and her late husband issued summons in this court seeking an order, cancelling the agreement of sale between the parties and the eviction of the applicants from the property in dispute being Lot E Isabel Road, Lobenvale, Bulawayo. It is common cause that the applicants on the one hand, and the respondent and her later husband on the other hand entered into an agreement for sale of the above-mentioned property in the sum of ZW$600 000,00. The applicants paid a deposit of ZW$300 000,00 and the balance was to be paid in instalments. A dispute arose between the parties resulting in the issuance of summons, *supra,* by the respondent and her late husband. The matter was eventually set down for trial on 6th to 8th September 2011. During the trial the applicants were represented by a Mr P. Madzivire their erstwhile legal practitioner of Messrs Joel Pincus, Konson and Wolhuter. At the commencement of the trial the parties signed a consent paper and as a result a consent judgment was granted. After the consent order had been granted the applicants filed an application for rescission of the said consent judgment under case number HC 3035/11. The applicants further filed an urgent chamber application to stay execution of the said consent judgment. The respondent filed her notice of opposition to these applications on 18 October 2011. The applicants did not file an

answering affidavit or heads of argument. In January 2012 the respondent applied for the dismissal of the application for want of prosecution. The applicants' application was dismissed for want of prosecution under case number HC 137/12 on 19 January 2012. This application was filed seeking rescission of the order granted on 19 January 2012. The applicants' explanation for the default is that they had been in their rural home in Gweru from 18 October 2011 until 2012 hence their legal practitioner's failure to get in touch with them. It was incumbent on them to make satisfactory arrangements with their legal practitioners in connection with the litigation that they had instituted. The courts have time and again emphasized the need for litigants to be vigilant – *Ndebele* v *Ncube* 1992 (1) ZLR 288 (S). The courts will help the vigilant but not the sluggard. The courts are bombarded with excuses for failure to act. The applicants approached their original application in a very cavalier and supine fashion. They did not bother to find out the progress of their application for around three months. Their legal practitioners were warned in December 2011 that if they fail to file an answering affidavit or heads of arguments the respondent would apply for dismissal of the matter for want of prosecution. This warning was by way of a letter dated 19 December 2011. The applicants' legal practitioners did not respond. They did not inform the respondent that they were failing to communicate with their clients. The applicant only responded to the application for dismissal on 31 January 2012 i.e about a week after the order for dismissal had been granted. The "Notice of Opposition" is procedurally misplaced as the order had already been granted. This evinces lack of seriousness on the part of the applicants. This is an application for rescission of a default order dismissing the applicants' original application for rescission. The original application was for rescission of a consent order. The applicants cannot be allowed to repeatedly seek court's indulgence – *Songare* v *Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210 (S).

The applicants have further failed to show that they have a *bona fide* defence on the merits. They sought to set aside a judgment granted by consent. They were legally represented during the granting of the said judgment. They have not bothered to obtain an affidavit from their erstwhile legal practitioner explaining the circumstances under which such judgment was granted. They say in their affidavit "I and 2nd applicant were thus unduly pressured, intimidated and threatened with action so that we signed the consent order which was subsequently made a judgment of this court by Justice Cheda dated 6 September 2011." They do not state who forced them to sign the consent paper. In *Georgias & Anor* v *Standard Chartered Finance Zimbabwe Ltd* 1998 (1) ZLR 356 (H) it was held that the onus on the applicants seeking to set aside a consent judgment is a heavy one – see also *Washaya* v *Washaya* 1989 (2) ZLR 195 (H). It is trite from these authorities that the High Court has an inherent jurisdiction to set aside an order made by consent of the parties. The primary consideration is whether the person applying to have the order set aside actually consented or nor, but even if he did not consent, it does not follow that the order will automatically be set aside. Other factors, such as the nature

of the defence to the main action, any delay in bringing the application, and the importance of finality in litigation must also be taken into account. A simple perusal of the papers of the various court and chamber applications filed by the applicants shows an admission by the applicants that at all material times the purchase price was not paid in full. The wealth of evidence also shows how the applicants would default payments, apologise for the default and promise to pay and that as a result of such delinquency the agreement was ultimately cancelled. This is a dispute that dates back more than ten (10) years ago, and it is important that there be finality in this litigation. By their actions, the applicants have ensued that this matter is protracted. They only challenged the consent order when they realized that their obligations to pay the respondent in terms of the order had become due. They did not raise a complaint immediately after the court proceedings which gave rise to the consent order to show that they did not wish to be bound.

In the circumstances the application is devoid of merit and calls for costs on a punitive scale.

Accordingly, the application is dismissed with costs on the legal practitioners and client scale.

Cheda & Partners, applicants' legal practitioners

Calderwood, Bryce Hendrie & Partners, respondent's legal practitioners