

EDSON CHIKWATA

versus

SIDUMILE ENTERPRISES (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 28 OCTOBER AND 27 NOVEMBER 2014

Mr T. Make for the applicant
Mr S.. Chabvepi for the respondent

Opposed Matter

MOYO J: This is an application for rescission of a judgment granted against Applicant in default by this court on the 10th of February 2013. In that judgment it was ordered as follows:

- a) Defendant pays US\$39 329-01 being payment for money due to the Plaintiff for stocks and cash unlawfully removed from the Plaintiff by the Defendant.
- b) Defendant pays interest at the prescribed rate from the 30th of June 2011 to date of full payment.
- c) Defendant pays costs of suit at an attorney and client scale.

The summons in the matter is alleged to have been served on one Chris who is the Applicant's uncle. Applicant however denies ever receiving the summons and also denies that his uncle who is called Chrispen ever received the summons since he does not reside at Applicant's place of residence and Applicant also avers that during the day there is usually no one at his place of residence. He claims that Chris (his uncle) is known to the directors of the Respondent so there is a possibility that his name was mentioned to substantiate a false claim on the service of the summons at his (Applicant's) house. He further states that he has a good case on the merits as Respondent's claim in the main action was for funds that he is said to have unlawfully embezzled whilst in Respondent's employment. He avers that Respondent has numerous audit reports, that give different amounts as to what was allegedly misappropriated. He also avers that the audit reports did not take into account certain issues like monies properly expended by the company. The Applicant's uncle one Chrispen Zvimba swore to an affidavit and

confirms in that affidavit that he has never been to the Applicant's residence in Gwabalanda where it is alleged he was purportedly served with the summons. He further confirms that he was never served with the process in case number HC2105/12 as alleged. He therefore distances himself from the issue. Respondent's Counsel argued that it could not have been a matter of coincidence that Applicant has an uncle called Chrispen and then the Deputy Sheriff also served summons at Applicant's place of residence on one Chrispen who is Applicant's uncle.

In an application for rescission of judgment, the court has to use a two-tier approach. The first question is to find if the Applicant was in wilful default, and the second is to find if Applicant has a good case on the merits. The second leg of the enquiry is only pursued if the first leg that of a reasonable explanation for the default, has been satisfied. Refer to *Songore v Olivine Industries Pvt Ltd* 1988 (2) ZLR 210.

The Applicant avers that he has a defence against the Respondent and also goes on to show that Respondent has been throwing around different figures as the amount he allegedly embezzled. It is important to note again that Applicant avers that he was reported to the police for the same case and the State declined to prosecute him for lack of evidence. Respondent's Counsel submitted that Applicant does not specifically state that he does not owe the Respondents money, but that he seems to be challenging the amount claimed only. Respondent's Counsel also submitted that the final audit which gives the embezzled figure as \$39 329-01 is the correct one and that therefore Applicant has no defence to the case.

Whether Applicant is in wilful default

It is the finding of this court that it has not been proven that Applicant's averments on that he never received the summons are in fact false. Applicant's uncle the "Chris" who purportedly received the summons refutes having received it. This court therefore can not nonetheless make a firm finding that in fact Chris did receive the summons as alleged when he states to the contrary. Applicant will thus be given the benefit of the doubt on that aspect.

Whether Applicant has a good defence on the merits?

Respondent's case is based on embezzlement of funds by Applicant whilst in their employment. The figures are given in three different audit reports, one for \$79 843-51, one for \$56 000 and the

other for \$39 329-01 which is the final one that formulated the basis of the Respondent's claim against Applicant in HC 2105/12.

The State also declined to prosecute the Applicant for the same matter, and although in criminal matters the yardstick is proof beyond reasonable doubt as opposed to a civil claim where proof is on a balance of probabilities, it is clear that for the State to have declined to prosecute, anomalies were observed in the entire claim. It is also in the court record that upon being advised of the embezzlement claims by Respondent, Applicant did on 8 April 2012 respond and requested copies of the audits and stock take reports as per Annexure C to the founding affidavit. Applicant claims that such information was never sent to him.

It is clear that this is a case wherein the door can not be shut on the Applicant to be heard by this court.

Respondent must prove its claims against the Applicant. The Applicant has not been shown to have been in wilful default as the aspect of service of the summons on Applicant's uncle remains in issue. It is for the aforesaid reasons that I find that in the interests of justice the default judgment entered against the Applicant in HC2105/12 be rescinded.

I accordingly order as follows;

- 1) The default judgment granted against Applicant in HC 2105/12 be and is hereby rescinded.
- 2) Applicant be and is hereby granted leave to file his notice of appearance to defend within 10 days of the date of delivery of this judgment.
- 3) That costs be in the cause.

Ndove, Museta and partners, applicant's legal practitioners
Messrs Dube-Banda, Nzarayapenga and partners, respondent's legal practitioners