HB 69-17
HC 2152-03
XREF HC 2159-03

NDABEZINHLE NCUBE
versus
THERESA ALWANGER

HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 17 MARCH 2017 AND 23 MARCH 2017

Opposed Application

S Mushonga for the applicant
Respondent in person

MATHONSI J: The applicant seeks a rescission of a default judgment granted by this court 14 years ago on 27 November 2003 in terms of which NDOU J ordered that the Memorandum of Agreement of Sale between the applicant and the respondent entered into on 4 December 1996, then 7 years earlier but now 21 years ago, relating to the sale of a vacant stand being Lot 2 of Subdivision 3 of Lot 9 Woodville, Bulawayo (the property) be cancelled.

Since the parties entered into that agreement, its not only the lengthy period of time that has lapsed and the cancellation of their sale agreement by court order that have eventuated. A third party moved onto the vacant land, constructed a home there and has been staying there with his or her family, it being the home that they know which provides comfort and shelter to them. Now the applicant would like to turn back the hands of time and drag the parties back to the *status quo ante* which subsisted more than two decades ago.

He states in the founding affidavit deposed to by Ebbie Muzha by virtue of a special power of attorney granted to her by the applicant on 8 April 2016, now "Elder" Mushonga has stepped in again by virtue of a similar document following the demise of Ebbie Muzha and he appeared before me representing the applicant, that the applicant visited the property which he expected to be still a vacant stand 20 years after he purchased it. Lo and behold, he found someone having built their home on it and they gladly gave him the respondent's address.

Upon proceeding to the respondent's address she also gladly gave the applicant a court order issued by this court on 10 October 2003 in HC 2152/03 granting the respondent leave to serve summons against the applicant in that matter by publication once in the Chronicle Newspaper. She also gave the applicant another court order issued by this court on 27 November 2003 which I have already made reference to, which cancelled their agreement. The respondent also told the applicant that after obtaining clearance from the court ownership had been passed to a third party who had built a home on the property.

The applicant stated a lot of extraneous issues about the subdivision of the land on which the property is located which are scarcely helpful for the resolution of this matter. Suffice to say that property was sold to him and it is not the property mentioned in the default judgment cancelling the agreement. One then wonders what interest the applicant has in rescinding a judgment which does not affect the property that he bought.

The applicant maintains that he was not served with the summons in HC 2152/03 even though his address was given in the sale agreement as No 23-7th Street Woodville Bulawayo. He however resides in South Africa, a fact known to the respondent. Instead of serving the summons at the given address, No 23-7th Street Woodville Bulawayo, the respondent proceeded to make an application for leave to serve the summons by publication, not in South Africa where he was known to reside, but in the Chronicle, a newspaper circulating in Bulawayo Zimbabwe. For that reason he did not see the notice and was not in willful default. The application for substituted service was "fraudulent and criminal."

In light of the fact that the respondent "tried to snatch a judgment" without serving him or his relatives with the summons, the default judgment should be rescinded. It is significant that the applicant did not set out the nature of his defence apart from questioning the subdivision, even with the knowledge that the respondent had sought to cancel the sale agreement on the ground of his failure to pay the purchase price in full.

The application has been opposed by the respondent who, self-acting, admitted entering into a sale agreement with the applicant on 4 December 1996 but not in respect of Subdivision 3 of Lot 9 Woodville Bulawayo which she says is where her own house is located. She stays there

and could not have sold it. The land that she sold to the applicant is Lot 2 Subdivision 3 of Lot 9 Woodville Estate. Interestingly the parties entered into a sale agreement in respect of a piece of land which was yet to be subdivided because by letter dated 31 December 1996, the Surveyor General was still requesting the respondent to submit a subdivision diagram in terms if s25 (2) of the Land Survey Act. If that is so, the agreement of sale was in contravention of s39 (1) of the Regional, Town and Country Planning Act [Chapter 29:12] which precludes a person from subdividing any property or entering into any agreement for the change of ownership of any portion of a property except in accordance with a permit granted in terms of s40 of that Act. See *X-trend-a-home (Pvt) Ltd* v *Hose Law Investments (Pvt) Ltd* 2000 (2) ZLR 348 (S) 355 B-C.

The respondent stated that she sought to cancel the agreement because of a series of breaches by the applicant who failed to pay the full purchase price. It is not clear what was not paid of the purchase price because in her opposing affidavit the respondent produced a breakdown showing that $7500-00 remained unpaid of the purchase price of $80 000-00. In his affidavit in support of the application for default judgment in HC 2152/03 she said only $48000-00 was paid.

Whatever the case, it is crucial to note that the applicant only adverts to having paid that purchase price in full in his answering affidavit but does not even attempt to show how that feat was achieved. I say that because while in the founding affidavit he alleges something to the effect that "applicant fully paid the purchase price" and refers to annexures as proof of such payment, they only add up to $37500-00 and not $80 000-00. Therefore the applicant's own papers do not prove that the purchase price was paid in full lending weight to the respondents complaint of a breach of the agreement.

This is an application made in terms of r63 of the High Court of Zimbabwe Rules, 1971. That rule requires an applicant for rescission of judgment to show good and sufficient cause for the rescission of the judgment granted in default. In determining what constitutes "good and sufficient cause" this court has a very wide discretion. See *Deweras Farm (Pvt) Ltd and Others* v *Zimbank* 1998 (1) ZLR 368 (S) at 369 E-370A; *Morkel* v *ABSA Bank Ltd and Another* 1996 (1) SA 899 (C).

Let me repeat what I stated in *Croco Properties (Pvt) Ltd* v *Swift Debt Collectors (Pvt) Ltd t/a Ruby Auctions* 2013 (2) ZLR 79 (H) at 83 F-G, 84A:

> "In the exercise of its wide discretion whether to grant an indulgence to an applicant for rescission of judgment, the court has regard to essentially three factors, namely the reasonableness of the explanation for default, the *bona fides* of the application and the *bona fides* of the defence on the merits which *prima facie* carries some prospect of success: *Stockil* v *Griffiths* 1992 (1) ZLR 172 (S); *Mazuva* v *Simbi and Others* 2011 (2) ZLR 319 (H) at 322; *Govha* v *Ashanti Goldfields Zimbabwe Ltd* HH-48-12. All these factors must be considered in conjunction with each other and with the application as a whole. An unsatisfactory explanation for one may, in fact, be strengthened by a very strong defence on the merits: *Georgias and Another* v *Standard Chartered Finance Zimbabwe Ltd* 1998 (2) ZLR 488 (S) at 493C; *du Preez* v *Hughes NO* 1957 R & N 706 (SR) at 709 A-F. The applicant must show what entitles him to an indulgence."

I still stand by that pronouncement. In the present case I am not satisfied that the applicant has shown what entitled him to the indulgence that he seeks. In the first place, it has taken him several years to assert whatever right he may have in the property whether real or imagined. Meanwhile certain third parties have also acquired rights over the same property. A person has built a home there.

In addition, the so-called right itself appears to be shaky to the extent that the agreement of sale that he entered into with the respondent was prohibited by s39 (1) of the Regional Town and Country Planning Act. Therefore that agreement is unenforceable at law. The applicant is therefore standing on sinking sand.

In order for the respondent to obtain judgment she approached the court and obtained an order allowing her to advertise the summons. This was done in terms of a court order which remains extant. The default judgment was therefore granted lawfully. For the same court to rescind that judgment, it must be satisfied that there is good and sufficient cause. I am not satisfied. Why should we unravel a matter that was determined and finalized more than 14 years ago and in the process upset existing rights of others merely to allow a party that went into hibernation a long time ago to pursue a defence which is unlikely to succeed?

In my view there is no reason to do that. What accords with justice is to uphold the default judgment and let the applicant pursue other remedies if he has any. The application must therefore fail.

In the result, the application is hereby dismissed with costs.