HB 53/18
HC 2622/17

ISAIAH MUDZENGI

Versus

EDWARD MUVENGEDZWA

And

PORTIA GETRUDE WINE

And

ROBERT NYAWASHA

IN TH HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 14 FEBRUARY & 8 MARCH 2018

Opposed Application

A Sibanda for the applicant
J. Magodora for the respondent

MAKONESE J: This is an application for rescission of judgment. The application is opposed. On the 28th of September 2017 the applicant's legal practitioner, Mr Albert Mhaka failed to attend court and a default judgment was granted in favour of the respondent. Applicant's legal practitioner avers that his legal practice is based in Gweru and he practices under the name and style of Mhaka Attorneys. In his sworn statement in support of this application, Mr Mhaka states that the matter under case number HC 1625/17 was set down for hearing on 28th September at 9:00 hours. Mr Mhaka states that he left Gweru enroute to Bulawayo around 0700 hours and that due to inadvertence, he thought in his mind that the hearing was set for 10:00 hours. He states that he arrived at court around 9:20am and proceeded to the court room where the matter was to be head at about 9:45am only to realise that the court was in session. His matter had been dealt with in default. Applicant's legal practitioner apologized to this court for his inadvertence caused by the fact that he mistook the court time to be 10:00 am instead of 9:00am. The applicant confirms that he has always desired to prosecute

his claims. It has been argued on behalf of the applicant that this is not one of those cases where there is deliberate and willful failure to act.

The respondent argues that the application for rescission of judgment ought to be dismissed as the explanation advanced by the applicant's legal practitioner for his default is inexcusable and not plausible. It is argued on behalf of the respondent that the conduct of the legal practitioner borders on "gross incompetence" and that consequently, the applicant only has himself to blame as he chose the legal practitioner to represent him. Respondent contends that the applicant's legal practitioner is not acting in good faith and that he has advanced "flimsy" reasons for his failure to appear in court. Further, it is argued on behalf of the respondent that there is no proof whatsoever that Mr Mhaka ever attended at the High Court on the day in question. It does occur to me, that the applicant's legal practitioner ought to have shown that he attended court on the 28th September 2017 by at the very least approaching the Judge's Clerk or the Judge in Chambers explaining his dilemma. This would have been courteous and prudent. As things stand the court simply has to rely on the legal practitioner's sworn statement that seeks to explain the cause for the default.

In terms of Rule 63 (2) of the high Court Rules, 1971 it is provided that the court may set aside a default judgment if it satisfied that there is good and sufficient cause for doing so.

The court considers the following:

(a) the applicant's explanatin for the default
(b) the *bona fides* of the application to rescind the judgment.

The applicant avers that his prospects of success in the main claim are very bright. In the main claim that was dismissed in default, the applicant seeks an order for an interdict against the respondents. Applicant seeks an order interdicting the respondent from selling residential stands at a property belonging to the applicant known as the Remainder of Lot 1 of Bucks of Fife Scott Block Gweru. On the 9th of November 2016 applicant entered into a written agreement with the respondents for the development of this property. The respondents undertook to develop 1 049

residential stands for sale. The applicant and respondents would share proceeds from the sale of the stands in agreed ratios for their mutual benefit. The respondents were obliged to pay to the applicant the sum of US$60 000 being a commitment fee within a period of 5 months from signature of the agreement. The parties were required to form a development board charged with the responsibility of any decisions taken on the development project. The parties further agreed to set up an office in Gweru from which the affairs of the project would be administered. A dispute has now arisen, with the applicant alleging that the respondents have breached the agreement by failing to pay the commitment fee. The applicant also alleges that the respondents have without his knowledge or consent sold stands and failed to account for those proceeds. Applicant discovered that the respondents were selling stands on the 16th of June 2017 when he observed some vendors distributing fliers indicating that respondents had set up offices in Gweru for the purposes of conducting the sale of stands. Applicant also established that respondents had engaged brokers known as Oldkell Investments, trading as Oasis Housing, to advertise and sale the stands. Applicant contends that he holds the Title Deeds to the property and that inspite of written notice to remedy the breach of contract, the respondents had in fact sold some stands to some home seekers without his knowledge. For this reason, the applicant had sought to interdict the respondents from disposing of the stands.

The respondents do not deny that a dispute has arisen over the sale of the stands. The respondents argue, however, that the applicant's intention is to remove the respondents from the joint venture and deprive of the money they have already invested in the project. From this brief synopsis of the background to the dispute there can be no doubt that the applicant's claims are *bona fide*. If the application for rescission is refused there is likelihood of substantial financial prejudice on the part of the applicant. It seems to me that the respondents' assertion that there has not been any disposal of stands contradicts their position that they have invested huge amounts of money into the project. Of greater significance, though is the clear admission that the respondents have not paid the commitment fee of US$60 000. This a clear violation of the written agreement, and for that reason alone, the application for an interdict would have a firm legal basis.

In *Zimbabwe Banking Corporation* v *Masendeke* 1995 (2) ZLR 400 (S) McNALLY JA, succinctly explains what constitutes willful default in the following terms at page 402D:-

> *"Wilful default occurs when a party, with the full knowledge of the service or set down of the matter, and of the risks attendant upon default, freely takes a decision to refrain from appearing …"*

See also *Mdokwani* v *Shoniwa* 1992 (1) ZLR 269 (S)

In this matter it cannot be said that applicant's legal practitioner wilfully failed to appear in court. His explanation for the default is plausible. Default judgment was entered on the 28th September 2017. The application for rescission of judgment was timeously made on the 5th of October 2017. Respondents' legal practitioner referred this court to the case of *Beitbridge Rural District Council* v *Russel Construction Co (Pvt) Ltd* 1998 (2) ZLR 190 (SC). The facts of that matter are clearly distinguishable from the present case. The brief facts as set out in the head note are that after the appellant Council (Beitbridge Rural District Council) failed to pay the respondent (Russel Construction) for construction work carried out, summons was issued against council in September 1993, claiming the sum due plus interest. No appearance to defend was entered within the 10 day period and Council was automatically barred. At that stage, both parties were represented by the same firm of legal practitioners, who advised both to seek different legal practitioners. The Council's legal practitioners were briefed in January 1994, and purported to enter appearance to defend. They did not apply for the removal of the automatic bar. The respondent briefed its legal practitioners in June 1994 and applied for default judgment in respect of the interest claimed, the capital having been paid. Default judgment was granted. Council became aware of the judgment when its property was attached. In August 1994 Council applied for rescission of the default judgment. The application was refused by the High Court. The court held on appeal that in granting rescission the court normally considers:

(a) the applicant's explanation for his default
(b) the applicant's good faith
(c) the *bona fides* of his defence on the merits as well as the prospects of success

The court held that in regard to the explanation, no explanation at all was advanced by the legal practitioners for the failure to enter appearance to defend. No explanation was given by the legal practitioners why no application was made for the lifting of the bar. It was held that though the fault was largely that of Council's legal practitioners, this did not assist. Non-compliance or willful disdain of the rules of court by a party's legal practitioner should be treated as non-compliance or willful disdain by the party himself. In any event the court found that on the facts there was no *bona fide* defence to the claim for the payment of interest.

In the matter before me it is clear that the applicant's legal practitioner was not "grossly negligent" in the manner described by the respondents. The legal practitioner was certainly negligent to some degree in arriving late for court but it cannot be said that he took a conscious decision to refrain from appearing. The degree of negligence does not in my view amount to willfulness.

I have already indicated that there are good prospects of success in the main action, and if this application is refused the applicant may not have an alternative remedy. The applicant in my view satisfies the requirements for rescission of the default judgment.

Before I conclude, I must comment on a complaint raised by *Mr Sibanda*, appearing for the applicant. The issue raised is that the language used by the respondent's legal practitioner in is heads of argument and the words employed in the opposing affidavit lack restraint. The language used is strong and inflammatory. In particular the respondent's legal practitioner avers that the explanation for the non-appearance is *"just a figment and not plausible.* It is further averred that the conduct of the applicant's legal practitioner '*borders on gross incompetence and outright fiction."* It is further asserted that it is "*absurd"* to suggest that the legal practitioner did not notice the set down time and that it was "*ludicrous"* to make such suggestion.

For this part, *Mr Magodora* appearing for the respondents apologised to the court and indicated that it was regretted if the language used was inflammatory. I must remind legal practitioners that they must always refrain from using strong or inflammatory language. In my view strong and inflammatory language is not helpful. It does not assist the court in anyway.

The dignity and respect of court process is severely eroded by words that whip up emotions. Legal practitioners must tone down their language. In this regard I would associate myself with the remarks by NDOU J in the case of *Mutanga* v *Mutanga* 2004 (1) ZLR 487 (H).

I would, accordingly make the following order.

1. The application for rescission of judgment be and is hereby granted.
2. The judgment of this court granted in case number HC 1625/17 on 28th September 2017 be and is hereby rescinded.
3. No order as to costs.

Mhaka Attorneys c/a Mathonsi Ncube Law Chambers, applicant's legal practitioners
Magodora & Partners, respondents' legal practitioners