BISHOP NEHEMIA GOVATI MUTENDI
versus
THE TRUSTEES FOR THE TIME BEING
OF ZCC CHURCH
and
MACDONALD CEPHAS MUSWERE
and
MUSWERE HAULAGE DYNAMICS (PVT) LTD
and
THE DEPUTY SHERIFF, HARARE

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 23 JULY 2013

R. Tawagadza, for the applicant
L. Zero, for the 1st and 2nd respondents
3rd respondent in default

Urgent chamber application

MATHONSI J: It is crucial in this matter to begin with the opposite remarks of WESSELLS J in *Whittaker v Ross & Anor* 1911 TPD 1092 at 1102-1103 that:-

> "The object of the court is to do justice between the parties. It is not a game we are playing, in which, if some mistake is made, the forfeit is claimed. We are here for the purpose of seeing that we have a true account of what actually took place, and we are not going to give a decision upon what we know to be wrong facts."

I have in the past complained about the unacceptable habit of litigants electing to trifle with the courts and in the process bring the courts to disrepute: *Greenland v Zichire* HH93/2013.

Stripped of all the noise and high flower language which at times borders on the intemperate, the dispute between the parties is simply that after the first and second respondents had issued summons against the first and second applicants in case number HC 12808/2012 on 2 November 2012, the applicants herein, through the medium of their then legal practitioners *Messrs Mutendi and Shumba* entered appearance to defend on 19 November 2012, well within

the *dies inducae*. That appearance was duly served on *Messrs Scanlen & Holderness* who then acted on behalf of the first and second respondents. Unfortunately, the case number was erroneous given as HC 2808/2012 instead of HC 12808/2012 omitting the first digit in that case reference.

Believing that appearance had been entered for dilatory purposes and that there was no *bona fide* defence *Messrs Scanlen, & Holderness* filed an application for summary judgment on 14 December 2012 which was opposed by the applicants. That application never saw the light of day as trouble started when *Messrs W. O.M. Simnago & Associates* assumed agency on behalf of the first and second respondents on 22 May 2013.

They immediately withdrew the summary judgment application and filed an application for default judgment on the basis that;

> "(a) The first and second defendants having failed to enter an appearance to defend the plaintiff's summonses (sic) and particulars of claim by the 28th day of November 2012 and remains (sic) in default thereof;
>
> (b) The first and second Defendants having been automatically barred in terms of Rule 50 of the Rules of the High Court, 1971;
>
> Judgment may be entered for the plaintiff's/applicant's against the first and second defendants / respondent (sic) as prayed for in terms of the Draft Order Attached hereto."

I note that the summary judgment application and all the other documents which had been filed previously were not included in the bound application for default judgment when it was set down on the unopposed roll for 5 June 2013 and it was not brought to the attention of the court that such documents existed, the respondents having relied on the fact that no appearance was entered. Now, to me this is trifling with the court in the extreme and taking advantage of a slight typing mistake, which is completely alien to the legal profession.

The first and second respondents could not claim a forfeit for the slightest mistake that was made in the case reference. Now the applicants have made an application for a stay of execution which I must say is also riddled with irregularity.

No separate application for rescission of judgment has been made and the applicants seem to wallow under the misapprehension that rescission can be granted on the return date. This

is myopic because such an application cannot be brought on an urgent basis. Rule 63(1) provides that it must be on notice to the other interested parties. The applicant will have to file a separate application for rescission of judgment.

The question therefore is whether the stay of execution should be refused in the circumstances of this matter. In my view, the default judgment was erroneously sought and erroneously granted entitling the court to even rescind it *mero motu.*

Although I am not sitting to decide whether to rescind the judgment entered in default or not, my brief being to decide whether to stay execution, it is useful to have regard to the remarks of ROBINSON J in *Banda v Pitluk* 1993 (2) ZLR 60 (H) 64F-G where the learned judge stated:-

> "In my view, when considering the question of rescission of a default judgment under r449(1)(a) on the ground that it was erroneously granted in the absence of any party affected thereby; once the court finds, as it has found in this case, that the judgment was erroneously granted against the defendant, either because of an error on the part of the judge before whom the application for default judgment was placed in failing to observe the notice of appearance to defend contained in the court file or, as is much more likely because of the absence of the notice of appearance to defend in the court file, through delay on the part of the Registry staff in placing the notice in the court file, then that is an end to the matter and the court should rescind the judgment as I therefore intend to do in this case."

Here we have a case in which appearance was entered and notice given to the plaintiffs. They accepted the notice and made an application for summary judgment only for a new lawyer with different ideas to come onto the scene and pretend such notice was not given. He pulls the wool over the court's eye by submitting that no appearance was ever entered and obtains a default judgment. The practice of law is always full of surprises but that is taking the point too far.

This court has the power to regulate its processes and as such although the application has its procedural challenges, I will direct that an application for rescission of judgment be made separately. Having become aware of how the judgment was obtained, I have a duty, in the interest of justice to prevail over the issue and bring sanity. The applicants will have to also amend the terms of the final order they seek.

Accordingly, I grant the provisional order in terms of the amended draft, the interim relief of which is as follows;-

INTERIM RELIEF GRANTED

Pending the determination of this matter, the applicant is granted the following relief;-

1. The execution of the judgment of this court granted in default on 5 June 2013 in case No. HC 12808/2012 is hereby stayed pending the filing and determination of an application for rescission of judgment.
2. The applicants are directed to file such rescission of judgment application within 10 days of the date of this order.

Messrs I. Murambasvina, applicant's legal practitioners

Messrs W.O.M. Sinmago & Associates, respondent's legal practitioners