

COKASA LEADS (PRIVATE) LIMITED
and
COLLINS KABAIRA
versus
NELHURST TRADING

HIGH COURT OF ZIMBABWE
MATANDA – MOYO J
HARARE, 29 November 2013 and 11 December 2013

OPPOSED MATTER

V. Mukwachiri, for the applicant
K. Musimwa, for the respondent

MATANDA-MOYO J: This is an application for rescission of default judgment granted on 10 May 2012 in Case No HC 3958/12.

The background to the matter is that the applicant borrowed US\$40 000 from the respondent at an interest of 20% per annum in February 2011 and payable by 28 February 2012. The applicant failed to liquidate the debt when it became due resulting in the respondent issuing summons on 21 April 2012 for the US\$80 000.

The applicant was served with the summons and did not file any appearance to defend within the time stipulated by the rules as he alleges that he was in Uzumba Maramba Pfungwe where there is no network. Applicant returned to Harare on 15 May 2012 only to realise that the matter had been set on the unopposed roll and an order was granted in favour of the respondent.

In execution of the court order, the respondent served the first applicant with a writ of execution on 19 June 2012 and removal was on the same day. The removed property have been already advertised and sold in execution.

In limine it was argued by the respondent that the second applicant was not properly before the court as he had not deposed a founding affidavit. The second respondent had deposed an affidavit on behalf of the first applicant.

The applicant contended that since he, the second applicant had deposed an affidavit on behalf of the first applicant, that sufficed, as deposing to another affidavit would be

tantamount to replicating the one he had made on behalf of the first applicant. However, I did not find any merit in this argument as it is an established principle of company law that a company is a separate legal *persona* from its officials *Solomon v Solomon & Co* 1897 AC 22 HC.

As such I upheld the point *in limine* and proceeded to rule pertaining to the first applicant only as it is the one properly before me.

This application is in terms of r 63 of the High Court Rules 1971. The applicant is in gross and flagrant breach of the same rule which is clear and unambiguous that an application of this nature has to be made not later than one month after having knowledge of the judgment.

In casu the applicants became aware of the default judgment on 19 June 2012 and only filed their application on 21 August 2013. No application for condonation for late filing has been filed of record. It was contested on behalf of the respondent that the property subject of this application has been sold and there are now third parties involved in this matter who are owners of an immovable property which was attached belonging to Collin Kabaira (who is not a party before this court in this application.) ZB bank holds a mortgage in this immovable property and these are not party to the proceeding *in casu*.

While I am aware of r 87(1) of the High Court Rules 1971 which deals with joinder or non-joinder of parties as not defeating the cases before the courts, it is trite that r 87(1) does not absolve a litigant of the obligation to cite all relevant parties. The court must exercise its discretion to ensure that all persons who might be affected by its determination of the issues in dispute be offered opportunity to be heard before determination is actually made *Rodger & Ors v Muller & Ors* 2010 ZLR 49H. Non citation of the other two parties with vested real rights in this matter is fatal to the application.

Delving into whether or not “good and sufficient cause” has been shown for the rescission would be a waste of time as the applicant has failed to diligently execute his application.

It is therefore ordered that:

1. The application for rescission of default Judgment No. HC 3958/12 be and is hereby dismissed.
2. The applicants shall pay costs of suit.

TH Chitapi & Associates, applicants' legal practitioners
Musimwa and Associates, respondent's legal practitioners