CHIEF SUPERINTENDENT MOYO
and
PROSECUTOR GENERAL
versus
OMEGA CHATYOKA

HIGH COURT OF ZIMBABWE
MTSHIYA J
HARARE, 19 January 2015 and 11 February 2015

Opposed Application

J Uladi, for the applicants
W Chinamora, for the respondent

MTSHIYA J: this is an opposed application for rescission of a default judgment.

On 21 November 2013 this court granted the following default judgment:

"**IT IS ORDERED THAT:**

1. Toyota Sequoia Registration Number ACO 3422, Engine Number 310R-5599048, Chasis number STDDN5G18CS063229 be and is hereby released to the applicant.

2. The 1st and 2nd respondent be and are hereby ordered to release the Toyota Sequoia motor vehicle to the applicant forthwith upon service of this order to them by the Sheriff or his Deputy."

It is the above judgment that the applicants seek to have set aside arguing that, the first applicant who received the application late should not have been cited. The applicant also states that the Commissioner General of the Zimbabwe Republic Police should have been cited in the chamber application that resulted in the granting of the default judgment.

The first applicant states that the vehicle referred to in the order belonged to one Farai Auxuilia Chidoori (Chidoori) and not to the respondent herein. The vehicle in question had been held by the police as an exhibit in a criminal trial and, due to the above order, when the trial ended, the vehicle was released to the respondent. The applicants also argue that, if the default order had not been granted, the vehicle would not have been surrendered to the

respondent.

The respondent argued that the citation of first applicant was not fatal and that the issue cannot be raised now when there was no such reaction to the chamber application when the first applicant deposed to opposing papers on 14 November 2013. As for the citation of the Commissioner General of the Police, the respondent said it was non consequential since the order had already been complied with.

I agree with the position taken by the applicant because both preliminary issues were not fatal to the chamber application. They were matters that would have been attended to had the applicants cared to respond to the court papers in time. In any case the first applicant deposed to an affidavit on 14 November 2013 but never raised the issues.

With respect to the merits of this case, I am not persuaded to accept that the applicants were not in wilful default.

In paras 6 and 7 of his founding affidavit the first applicant states as follows:

> "6. On 25 October 2913 the respondent filed the aforementioned chamber application with this Honourable court. The said application wrongly cited the 1st applicant as Chief Superintendent Moyo and also did not cite the Commissioner General of the Zimbabwe Republic Police as is required by the Rules of this Honourable Court.
>
> 7. The 1st applicant thereafter received the application late and could not file his opposing papers with the time limits provided for in the rules of this Honourable Court."

We are, in para 7, above, told that the application was received late but no date is given. I take that to be a deliberate ploy to mislead the court. When such deliberate withholding of information takes place, the principle in *Leader Tread Zimbabwe (Pvt) Ltd* v *Smith* HH 131/03 applies. In that case it was stated as follows:

> "It is trite that if a litigant gives false evidence, his story will be discarded and the same adverse inferences may be drawn as if he had not given evidence at all – see *Tumahole Bereg* v *R* (1949) AC 253 and *South African Law of Evidenc*e by LH Hoffmann and D T Zeffert (3 ed) at page 472. If a litigant lies about a particular incident, the court may infer that there is something about it which he wishes to hide."

I agree with the above, which I also take to apply to deliberate omissions.

On her part the respondent states that:

"The first applicant was served through detective G. Chiwande on 25 October 2013."

I have no reason to doubt the averment. Detective G Chiwande has not been made to

deny or confirm the statement.

The papers before me show that on 14 November 2013 the first applicant deposed to opposing papers. However, that was already out of the time and judgment had already been obtained on 21 November 2013. Apart from the filing of the opposing papers, there is no evidence of further and immediate engagement with the respondent or her legal practitioners. That lack of action eventually led to the granting of the High Court Order in the lower court.

Furthermore, para 11 of the founding affidavit filed by the first applicant reads as follows:

> "11. The defence has good prospects of success on the merits. The respondent had no legal right to claim the motor vehicle as the legal owner of the motor vehicle, a Toyota Suquoia, is Farai Auxullia Chindoori."

Clearly it is Chindoori who has an interest in this matter. The applicants can only assist her if so requested. Their interest in this matter remains a mystery, and as far as I read the papers, is non-existent.

In the main, the applicants have not advanced a reasonable explanation for the delay in responding to the chamber application. In any case the evidence by the applicants shows that the whole court process should be spear headed by Chindoori, the purported owner of the vehicle. It is the said Chindoori who should place before the court clear prospects that she can, with the support of the law, regain the vehicle from the respondent. The interests of the applicants in the vehicle fell away when the prosecution in the lower court ended.

There was never any need for the applicants to file this application and to that end costs on a higher scale would be justifiable.

In view of the foregoing, the application ought not to succeed.

The application is dismissed with costs on a higher scale.

National Prosecuting Authority, applicants' legal practitioners
Messrs Musunga & Associates, respondent's legal practitioners