

NICOZ DIAMOND INSURANCE COMPANY LIMITED
versus
MARIAN TIGERE
and
BENJAMIN MWAKONYATSANGANYIDZO
and
ANTONIO IBRAHIM JIVA

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE, 2 and 22 July 2015

Opposed Application

T Magwaliba, for the applicant
T Mpofu, for the respondent

UCHENA J: The applicant Nicoz Diamond Insurance Company Limited is a duly incorporated insurance company. Marian Tigere and Benjamin Mwakonya Tsanganyidzo the first and second respondents in this case, are the plaintiffs in the main case. Antonio Ibrahim Jiva the third respondent is the second defendant in the main matter.

The applicant applied for the rescission of a default judgment entered against it on 4 November 2013. The application dated 25 November 2013 was filed on 27 November 2013 two days after the applicant's legal practitioner discovered after perusing the record that a default judgment had been granted.

The following facts are common cause. The main case was set-down for trial on 29 October 2013. The applicant's legal practitioners received the, notice of set-down on 10 September 2013. The applicant and its legal practitioners did not attend court on 29 October 2013. A default judgment was granted.

In its application for rescission the applicant narrates why it did not attend court on 29 October 2013. It had received a letter from its legal practitioners which indicated that the case had been set down for hearing on 29 November 2013. It attached the letter as an annexure. Mrs *P Takawadiyi* the applicant's legal practitioner deposed to a supporting affidavit in which she confessed to having erroneously diarised the case for 29 November 2013 and thereafter

wrote a letter dated 16 September 2013 to the applicant advising it that the case had been set down for 29 November 2013.

Explanation of the Default, and Prospects of Success.

Mr *Magwaliba* for the applicant submitted that the default was due to an ordinary mistake which can be made by any legal practitioner. Mr *Mpofu* for the 1st and 2nd respondents submitted that the explanation for the default was based on lies as Mrs *Takawadiyi* had not submitted her diary for the respondent's inspection. He further questioned the delay in writing the letter to the applicant on 16 September and its being delivered to the applicant's offices in the same building 8 days later. Mr *Magwaliba*'s response relying on Mrs *Takawadiyi*'s response to the above stated criticism submitted that this was ordinary correspondence being sent and received in the ordinary course of business in circumstances where the trial date was two months away.

A default for which a litigant is penalised is one accompanied by a deliberate decision not to attend court, conscious of the consequences of so doing. It is inconceivable that the applicant who had prosecuted its defence up to the pre-trial conference would abandon its defence at trial stage. Mrs *Takawadiyi*'s explanation of the default is reasonable and acceptable. Most defaults are a result of lapses, mistakes and errors by litigants. What the court should look for in an application is an acceptable cogent explanation for the default. If the explanation is acceptable the court cannot find that the applicant was in wilful default. Wilful default was commented on by Gubbay CJ in the case of *Fletcher v Three Edmunds (Pvt) Ltd; Vishram v Four Edmunds (Pvt) Ltd* 1998 (1) ZLR 257 (SC) at p259 H to 260 A, where he said;

“First, it was submitted that the rationale for the finding that the defaults were wilful was wholly misconceived. I have no hesitation in agreeing with counsel. The failure on the part of the appellants to enter an appearance to defend within the prescribed period did not, per se, signify wilfulness. What should have been considered, but was not, was whether the explanation advanced for such failure was of unacceptable cogency, in the sense, that the inevitable inference it gave rise to was deliberate acquiescence not to defend the action. Put differently, but to the same effect, whether with full knowledge of the service of the summons and of the risks attendant upon default, a decision to refrain from appearing was freely made.”

It is in my view conceivable that one can incorrectly copy from a document before him or misread it. It is therefore quite possible that Mrs *Takawadiyi* made the mistake she said she made. The issue of errors and mistakes was dealt with in the case of *Zimbabwe Banking Corp Ltd v Masendeke* 1995 (2) ZLR 400 (SC) at p 402 D to G where McNally JA said;

“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: *Neuman (Pvt) Ltd v Marks* 1960 R & N 166 (SR) at 169; 1960 (2) SA 170 (SR) at 173; *Simbi v Simbi* S-164-90 at p 6; *Mdokwani v Shoniwa* 1992 (1) ZLR 269 (S) at 271.

Here there was a mistake. It was clearly a mistake. Zimbank had no possible reason to allow the claim against it (which was for \$50 000) to go by default. No-one, and in that term I include Mr Moyo of Chikumbirike and Associates who acted for Mr Masendeke, could reasonably have thought otherwise.

The mistake was, like many mistakes where documents go astray in the filing system of an organisation, inexplicable. And one wonders how the court would benefit if a minute and detailed investigation were to reveal how the summons came to be filed without coming to the attention of the General Manager. The important explanation is that it was filed, and it did not come to his attention.

It is a credible explanation precisely because of the point I made earlier **the extreme improbability that Zimbank, through its General Manager, would intentionally abstain from defending this claim.**”(emphasis added)

The respondents’ counsel’s insinuations, of unfounded improper conduct, against Mrs *Takawadiyi* does not take their case any further. The applicant could simply not have wilfully decided not to attend court but thereafter decided to make this application. As explained by McNally JA mistakes and errors do happen. I find that nothing will be gained by investigating Mrs *Takawadiyi*’s confessed mistake. There is in my view nothing wrong in her writing to her client 6 days after receiving the notice of set down. There is again nothing wrong with the letter being received 8 days later even though they are in different floors of the same building. The dispatch and movement of documents is dictated by their urgency. Mrs *Takawadiyi* said she did not place any urgency on this letter as it was about a trial which she believed was to take place two months later. The criticism based on signing for the letter, recording the time of its receipt is of no consequence, because each organisation has its own way of receiving correspondence. The respondents cannot expect the applicant to use their own preferred method.

In this case the applicant was being sued in its capacity as the insurer of the driver who had an accident with the first and second respondents. Mr *Mpofu* for the respondents submitted that there are no prospects of success because the driver has admitted liability. That submission ignores the nature of an insurance contract. An insurance contract is based on the agreed terms of contract between the insurer and the insured. Mr *Magwaliba* submitted that there are prospects of success because the applicant’s agreed liability to the insured was limited to the amount of Z\$10 billion dollars. He submitted that the applicant’s liability must be assessed and be limited to the equivalent of Z\$10 billion. This in my view establishes

strong prospects of success in the sense that applicant's liability should not exceed the sum assured.

The applicant's prospects of success are demonstrated by Mathonsi J's comments about the damages he awarded. He at p6 of the cyclostyled judgment said;

"I must say that these awards would have been significantly different if the court had had the benefit of opposition. As it is no meaningful interrogation was made as to the quantum of damages the defendants having capitulated at the 11th hour."

It is apparent from the judge's comments that he did the best he could without the benefit of opposition, but would have benefitted from opposition which would have enabled him to accurately assess the quantum of damages. This means the applicant's participation if rescission is granted will enable the court to arrive at a realistic quantum of damages. When this is considered in addition to the applicant's liability being based on a sum assured, it increases the applicant's prospects of success.

Applicant's founding affidavit

Mr *Mpofu*, for the first and second respondents, submitted that the applicant's founding affidavit was deposed to by a person who had no authority to do so. Mr *Magwaliba* submitted that though Mr Noel Manika's affidavit was not supported by the applicant's resolution a resolution was subsequently obtained which ratified what Mr Manika had done in his capacity as General Manager (Operations). The resolution which is on page 32 of the record reads as follows;

1. Mr Noel Manika, in his capacity as the General Manager (Operations) for the Company, be, and is hereby authorised to sign all papers, applications, affidavits and all other documents as may be required to be filed in the High Court of Zimbabwe and all and any other courts in Zimbabwe in connection with any legal proceedings by or against the company relating to insurance claims and to represent the company in all other matters incidental thereto as may be considered necessary and expedient.
2. The Board hereby ratifies all actions hitherto by Mr Noel Manika pursuant to the said mandate done by virtue of his position as General Manager (Operations)

The second paragraph ratifies, what Mr Manika, had done in his capacity as General Manager. In his founding affidavit Mr Manika had in paragraph 1 said;

- "1. I am the General Manager for the applicant and as such am duly authorised

to depose to this affidavit”

The ratification in para 2 of the applicant’s resolution clearly covers the founding affidavit. Therefore nothing turns on his having deposed to the founding affidavit before authority was granted through the resolution.

In the result I order as follows;

1. The Judgment granted against the applicant in Case Number HC 2938/09 be and is hereby rescinded and consequently its plea be reinstated.
2. There shall be no order as to costs.

Messers Takawadiyi and Associates, applicant’s legal practitioners
Messers Coghlan Welsh & Guest, 1st and 2nd respondents’ legal practitioners.