BVEKWA LEGAL PRACTICE
versus
TOLL FREE ZIMBABWE (PVT) LTD t/a VASCOR

HIGH COURT OF ZIMBABWE
MUSHORE J
HARARE, 16 October and 9 December 2015

Court application

N Bvekwa, for the applicant.
S Nyangura, for the respondent

MUSHORE J: This is an application for rescission of judgment.

The facts of this case are these. The applicant, a legal firm carried out some work for the respondent company and subsequently billed the respondent. When the respondent received the bill, the respondent denied liability causing the applicant to institute proceedings for the collection of the said fees in matter number **HC 7956/2014.** The respondent defended the suit along the lines that it does not owe the applicant the amount claimed. The matter ran its usual course and it was at the pre-trial stage that the respondent asked for an opportunity to inspect the files where the work had been done as alleged by the applicant, together with the invoices for the fees charged. On 2 June 2105, the court ordered the Registrar of the High Court to oversee the verification/discovery exercise of some thirty six files, after which the parties were scheduled to appear at court on 15 June 2015 at 9:00am. The applicant's legal practitioner arrived at court at 9:25am believing that the matter was due to commence at 9:30am.

When the applicant's legal practitioner arrived at 9:25am, he discovered that the respondent had already sought and been granted default judgment. A day later, the applicant's legal practitioner then wrote to the respondent's legal practitioner seeking the respondent's co-operation and consent to setting aside the default judgment. After failing to secure the co-operation of the respondent with respect to a consent, the applicant then filed the current application for rescission. The respondent is opposed to the default judgment being rescinded. The issue for determination in this case is simply whether or not the applicant has made out a case for the granting of an order setting aside the default judgment.

In *Songore* v *Olivine Industries (Pvt) Ltd* 1988 (20 ZLR 210 (S), a three-pronged enquiry was conducted by the court of appeal in assessing whether or not "good and sufficient cause" existed for the rescission of judgment to be granted. In that case, for "good and sufficient cause" to be found to exist, the court had to be satisfied (i) that the applicant's default was not wilful, and (ii) that the applicant has a *bona fide* defence, and (iii) that the applicant has prospects of success in the prosecution of its cause in the main matter.

It is trite that these three considerations [*supra*] are neither exhaustive nor decisive and the court has a very wide discretion as to the manner in which it will consider giving the applicant leave to proceed. Because the court has available to it wide discretionary powers, public policy considerations often play a very key role.

In applying my discretion to the facts in the present case, so that I can assess whether or not the applicant has proved that 'good and sufficient cause' exists for the remedy of rescission, I am guided by the test applied by the court in the *Songore case* [*supra*] with my first point of enquiry being whether or not the applicant was in wilful default.

The respondent contends that the applicant's default was wilful because

the applicant is *dominus litis* and was therefore charged with the responsibility of arriving in court at time, and that the applicant's delay and eventual default arose from the applicant not taking court business seriously and not being vigilant. The applicant's legal practitioner on the other hand submits that he arrived at court 25 minutes late because on 2 June 2013 when he made the entry in his diary, he mistakenly marked the court attendance time as being 9:30am am instead of 9:00am. He states that when he arrived at 9:25am he was shocked to find that in between 9:00am and 9:25am, the respondents' legal practitioner had come and gone having sought and been granted judgment in default of his attendance. The applicant's legal practitioner submits that the wrong entry which he made was as a result of genuine error on his part. He adds that prior to making the current application he had requested the respondent's legal practitioners to consent to a setting aside of the default judgment and that that request was denied him.

Turning now to the evidence given by the applicant I find it to be of relevance and significance that the main matter had progressed to pre-trial conference stage and that beyond that point the parties have been engaged in a type of discovery process. All along the applicant has ensured that its pleadings were filed timeously and its legal practitioner has attended all meetings and proceedings on time, bar the one attendance which gave rise to this application. The number of files involved and for which the applicant claims payment of its fees is so significantly long that it is impossible for me to entertain a notion that the applicant intended to abandon this case midway. To that end it is my belief that the applicant would not suddenly and capriciously have discarded its claim in the main matter.

Further, my observation is that the delay by the applicant's legal practitioner was a mere 25 minutes. To that end I feel that the time within which the respondent's legal practitioner arrived and left with a default judgment was so hasty that it appears that when a chance opportunity presented itself to obtain

judgment, she acted upon it and seized the judgment. From an ethical point of view I would have expected the respondent's legal practitioner to exercise a modicum of patience before she took judgement. I am also dismayed at the respondent's legal practitioner's refusal to co-operate with the applicant's legal practitioner and failure to accede to the applicant's request to have the default judgment set aside. The request made was reasonable given the advanced stage that the main matter had progressed to; the numerous court attendances arranged at the respondent's behest and the extent to which the applicant had gone to accommodate the respondent's requests for discovery.

I reject the respondent's suggestion that delay of a mere 25 can be described as a failure to attend court. I cannot accept the respondent's contention that the applicant's failure to arrive at court timeously on 15 June 2013 can amount to conduct displaying a lack of interest by the applicant in the pursuit of its cause in the main matter.

I am persuaded also that the conduct displayed by the applicant's legal practitioners in vigorously pursuing its action in the main belies any notion that the applicant had given up on its claim in the main matter. The respondent's legal practitioner clearly 'snatched' a judgment from the applicant.

To that end, and taking into account that this application for rescission has been made well in time as envisioned by the rules of this court that being well within one month as measured in Order 9 Rule 63 (1) of the High Court rules there is no doubt in my mind that the applicant's legal practitioner's default on 15 June 2015 was not intentional and therefore the applicant was not in wilful default.

I turn now to the *bona fides* of the applicant's application but before doing so, I intend to first deal with the objections raised by the respondent's legal practitioner regarding the applicant's founding affidavit because my findings on this point relate to the *bona fides* of this application.

At the hearing of this application counsel for the respondent took the point that the applicant's answering affidavit wrongfully contained within it new information, which as far as she saw matters, was designed to cure a fatal omission in the founding affidavit.

However, when looking at the applicant's founding affidavit in the current application, the respondent's legal practitioner has given reasons for his default and the reasons why he feels that the default judgment should be set aside; and also why he is confident that he may succeed in the prosecution of the main matter. Clearly all three considerations for founding a basis for the setting aside of a default judgment are contained in the founding affidavit and in considerable detail. The information in the answering affidavit does not make up for any deficiency in the founding affidavit as has been suggested by the respondent. In fact my observation is that the reason why the answering affidavit is not as brief as would be expected is because the applicant is merely responding to the nit-picking submissions raised by the respondent's legal practitioner. I therefore cannot agree with the respondent's submission that the founding affidavit is fatal to the application.

Furthermore I am persuaded that the reason why the applicant has produced detailed notes pertaining to the work which it did for the respondent was to demonstrate the basis upon which it believes the respondent to be indebted to it. The notes which are handwritten provide a dated analogue of the work concerned. I have also noted the speed within which this current application was made because it demonstrates that the applicant has a genuine need to put its case forward so that the main matter can resume. Thus I am therefore satisfied (in conjunction with my acceptance that it was because of a mistake that the applicant's legal practitioner arrived at court 25 minutes late) that this application has been genuinely made. Accordingly I find that the application has been motivated by *bona fide* reasons on the applicant's part.

I now undertake to determine whether or not the current application has prospects of success. In the main matter, the issues really are quite simple. Whether or not the respondent is liable to the applicant for the payment of some moneys and if so, how much? Now, from a reading of the respondent's affidavit, some type of liability is accepted by the respondent in the main action and it is the *quantum* aspect and the method of payment that is yet to be adjudicated upon. In its opposing affidavit, the respondent pleads as follows:

> "10. AD PARA 13.
>
> This is disputed. Work was done however respondent disagrees with the quantum applicant is charging in the files. Further it was agreed before Applicant was given instruction at the beginning that he would be paid from the proceeds of the collection and not from the respondent's pocket."

To that extent, therefore the respondent sees matters in a generally similar way to the applicant in that both parties understand that the answer either way to the issue of liability is most probably ascertainable from the files of work done by the applicant. That being the case, it is obvious that the applicant has prospects of success, depending upon the evidence it has produced in the main matter. Thus if the remedy of rescission is to be denied at this juncture, then the discovery process in the main matter would have been for nothing. It would therefore be counter-intuitive for me to make a decision which has the effect of interrupting a court ordered process. And to that end it is my view that prospects of success do exist to some degree for the applicant company. Having applied the law to the facts in this matter, and having concluded that the applicant has established all three lines of enquiry satisfactorily it is my finding that 'good and sufficient cause' has been firmly established by the applicant for rescission to be granted.

I turn now to the issue of costs. The applicant is praying for costs on a legal practitioner and client scale to be awarded to it in the event that the

respondent opposes this matter. The respondent on the other hand rejects this outright.

In beginning my enquiry on the costs issue, and seeing that the request made by the applicant infers that ethical considerations be taken into account, in my determination of the applicant's entitlement to being granted costs on a legal practitioner and client scale, I have been guided by the *dicta* of Gillespie J (in a case cited by the applicant) that being F*ounders Building Society* v *Dalis (Pvt) Ltd and Ors 1998* (1) ZLR 526 (H*)*.The learned judge succinctly explained the type of reasoning which the courts adopt in matters of this sort when he said thus;

> "The courtesy of giving fair warning to other lawyers of an intention to take a technical point is one rather jealously guarded by the profession. One knows of a standard question, put to all those who are obliged to take professional oral examination in ethics. It is designed to elicit a response that the failure to give fair warning, before steps are taken, for instance, to bar an opponent or to take a technical point, is a discourtesy. It may result in an adverse order for costs against an attorney should costs be incurred undoing what was done without warning" See also *Khan* v *Mzovuyo Investments (Pty) Ltd* 1991 (3) SA 47

Further, the dictates of public policy regarding the need to ensure that there be finality in litigation, should be a reminder to litigants that where discourtesies of this nature occur and which ultimately create unnecessary work for the court, a court may, when asked, award higher costs against the unreasonable party , in addition to a reinstatement of the main case.

In the current case, this application would not have been necessary had the respondent's counsel been reasonable and consented to the judgment being set aside. Indeed and from an ethical point of view I am not impressed with the position taken by the respondent's legal practitioner.

Further the respondent seems to be inferring that I should examine the nature of the applicant's default whilst determining whether or not I will order costs on a higher scale. To that end, the respondent has made the following submission in its opposing affidavit:-

> "11. AD PARA 14.
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> There is no basis for an order of costs on an attorney client scale to be made as the applicant was in wilful default"

I find there to be no correlation between the award of costs and the conduct of the applicant. The award of punitive costs is assessed in relation to the conduct of the party against whom the order is sought. The court must examine the attitude and conduct displayed by that party in order to assess whether it ought to right the wrongs complained of by the party seeking a punitive costs order. Given the respondent's unreasonable and obstinate attitude in refusing to co-operate with the applicant to agree to have the default judgment set aside when it ought to have cooperated, I am inclined to award the applicant a punitive order for costs.

In the result, therefore, the applicant has made out a case for the relief which it seeks.

Accordingly I make the following order:

1. The application is granted.
2. The respondent is to pay the applicant's costs on a legal practitioner/client scale.

Bvekwa Legal Practice, applicant's legal practitioner's

Matsikidze & Mucheche, respondent's legal practitioner's