

CITY OF HARARE
versus
RICHARD CHITAMBO
and
THE SHERIFF OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 8 & 16 March 2016

Opposed matter

R Chingwena, for the applicant
Ms R Peters, for the 1st respondent
H Muromba, for the 2nd respondent

MATANDA-MOYO J: The applicant on 26 May 2015 caused the second respondent to issue interpleader notice, challenging the attachment of its property to satisfy a judgement debt owed by Rufaro Marketing (Pvt) Ltd. The brief facts are that this court on 24 April 2014 registered an award in favour of the first respondent against Rufaro Marketing (Pvt) Ltd. Consequent to such order the second respondent attached stand number 414 Midlands Township 5 of Uplands of Subdivision A of Waterfalls. The applicant claims ownership of such property and initiated the issuance of interpleader process by this court HC No. HC 4680/15 refers.

Upon being served with the interpleader notice the applicant's legal practitioners failed to file a notice of opposition as required by r 207 (b) of this court's rules resulting in a default order granted against it on 24 June 2015. The applicant now seeks rescission of that judgement and an order uplifting the bar operating against it.

The applicant's legal practitioner filed an affidavit in support of the application where he gives an explanation of mistake in understanding the rules. The applicant's legal practitioner believed that since his client had initiated the interpleader notice, there was no requirement for his client to file opposing papers. The correct procedure dawned upon him on being served with a default judgement. The applicant also submitted that it has good prospects of success on the merits as it holds title to the above attached property.

The first respondent opposed the application on the following basis;

- 1) That the legal practitioner wilfully failed to file opposing papers;
- 2) That the property in question is owned by the judgement debtor;
- 3) That the corporate veil should be lifted to reveal that the applicant and the judgement debtor are one and the same entity, and
- 4) That the attachment was done in 2014 and the applicant only brought interpleader application 8 months later. This shows lack of seriousness and an attempt to frustrate the sale of the property without just cause by the applicant.

This application has been brought in term of r 63 of this Court' rules which provides;

- “(1) A party against whom judgement has been given in default, whether under these rules or under any other law, may make a court application..... for the judgement to be set aside.
- (2) If the court is satisfied that there is good and sufficient cause to do so the court may set aside the judgement concerned..... on such terms as to costs and otherwise as the court considers just.”

The applicant and their legal practitioner have placed blame on their legal practitioner. The Supreme Court in the case of *Apostolic Faith Mission in Zimbabwe and 2 Others v Titus I. Murefu* SC 28/03 stated as follows;

“There is a limit beyond which a client cannot escape the consequences of the conduct of his legal practitioner and it seems to me that this limit has been exceeded in this case. See *Salooge and Another v Minister of Community Development* where Styn CJ remarked as follows:

There is a limit beyond which a litigant cannot escape the result of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of the Court. Considerations *ad misericordiam* should not be allowed to become an invitation to laxity. In fact this court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this court was due to neglect on the part of the attorney. The attorney, after all is the representative whom the litigant has chosen for himself, and there is little reason why in regard to condonation of a failure to comply with a rule of this court, the litigant should be absolved from the normal consequence from the normal consequences of such a relationship, no matter what the circumstances of the failure are.”

Equally in the case of *MM Pretorius (Pvt) Ltd and Another v Chamunorwa Mutambizi* SC 39/12 Ziyambi J.A. observed that;

“A legal practitioner is not engaged by his client to make omissions and to commit “oversights”. He is paid for his professional advise and for the use of his skills in the representation of his client. He is not paid to make mistakes. These could be costly to his client. He is professionally ethically and morally bound to exercise the utmost diligence in handling the affairs of his clients.”

However the above cases are distinguishable from the present. The procedure as laid down for interpleader process can be confusing to most legal practitioners. It is the claimant

who would have provided all the information including affidavits and proof of ownership of property under execution, for the Sheriff to institute the proceedings. The rules however still require such party to oppose the Sheriff's application and still file the same papers delivered to the Sheriff to the court. The legal practitioner herein believed that he could only await the notice of opposition from the judgement creditor. Whilst I do not intend to cause laxity and non-compliance with rules by legal practitioners I am of the view that the explanation by the applicant's legal practitioner herein is reasonable. His actions do not amount to wanton disregard of rules. However legal practitioners should always be diligent and read the rules and the papers served upon them to have knowledge of what's required of them.

The applicant submitted that it has prospects of success on the merits. It averred that the title deeds to the piece of land are in its name and not in the name of the judgement debtor. There has been no proof tendered in the hearing of the previous matters to show that the applicant and the judgement debtor are one and the same person.

The law pertaining to ownership of immovable property is settled. The *dominium or jus in re* of immovable property can only be conveyed by transfer. Any agreements of sale or delivery of immovable property to a purchaser without transfer only conveys personal rights on the purchaser. The applicant has produced title deeds showing that the immovable property in question is registered under its name. That means the *dominium* of the land still vests in the applicant. It follows that Rufaro Marketing (Pvt) Ltd only have personal claims against the applicant if the land was sold to it. See also *Chapenyama v Chapenyera* 2000 (2) ZLR 103 (S) – It is only registration of title which conveys real rights. See also s 14 of the Deeds Registries Act [*Chapter 20:05*].

I am of the view that the applicant has discharged the onus of showing that it has prospects of success on the merits. The issue of lifting of the corporate's veil has not been canvassed in the applicant's founding affidavit and I find no basis for dealing with that point.

The applicant in its Draft Order sought the upliftment of the bar operating against it. Such a request finds no base in the founding affidavit. The applicant in its founding affidavit did not state that it was also requesting for upliftment of bar.

Rule 84 of the court's rules allows an applicant to make an oral application at the hearing for the removal of the bar. I will condone the applicant's failure to mention such application in its founding affidavit after my finding that an oral application could still be made in terms of the rules. The applicant made such oral application. In view of my reasons in relation to rescission I am of the view that such application should be granted.

However since the default was a result of misunderstanding of the rules by the applicant's counsel it is only fair that costs of such application be borne by the applicant.

Accordingly I order as follows;

- 1) That the court order granted in case No. HC 4680/15 be and is hereby rescinded.
- 2) That the bar operating against the applicant in case No. 4680/15 be and is hereby lifted.
- 3) That the applicant shall file its opposing papers in case No. 4610/15 within 10 days of this order.
- 4) That the applicant bears costs of this application.

Kanokanga & Partners, applicant's legal practitioners
J Mambara & Partners, 1st respondent's legal practitioners
Kantor & Immerman, 2nd respondent's legal practitioners