REGAL INSURANCE (PVT) LTD
versus
TOTAL ZIMBABWE (PVT) LTD

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 7 & 20 July 2016

Opposed Application

W Musengwa, for the applicant
T Chiturumani, for respondent

CHAREWA J: This is an application for upliftment of a bar and rescission of judgment.

The facts

The facts which were common cause are that the applicant and the respondent entered into a lease agreement wherein the applicant leased office space at the respondent's service stations to conduct its insurance business. For one reason or another, the applicant defaulted on its rental payments. The respondent issued summons for provisional sentence on 29 September 2015, and obtained judgment on 4 November 2015.

On 7 December 2015 the applicant entered appearance to defend, but, despite being served with a notice to plead and intention to bar on 5 January 2016, failed to file its plea within the time limits prescribed by the rules. The applicant eventually filed its plea and counterclaim on 18 January 2016 after it had been barred on 13 January 2016.

The respondent obtained default judgment on 20 January 2016.

This application was subsequently filed on 5 February 2016.

The issues

The question that arises is whether or not the applicant has laid out good and sufficient cause to ground a request for the upliftment of the bar and rescission of judgment.

The Law

It is trite that for a party to succeed in an application of this nature it is necessary to satisfy the following pre-requisites:

1. With regard to condonation of failure to adhere to the rules, that it is fair to both sides and in the interests of justice for the court to exercise its discretion and condone any such failure. In its inquiry on this aspect, it is relevant for the court to consider the degree of non-compliance, the explanation thereof, the prospects of success and the jurisprudential importance of the case. (See *Govha* v *Ashanti Goldfields Zimbabwe t/a Freda Rebecca Mine and Anor* HH48/2012, *Manemo & Anor* v *Achinulu & Anor HB 12/2002, United Plant Hire P/L* v *Hills and Others* 1976 (1) SA 717.)
2. With respect to rescission of default judgment in particular, the court must determine whether good and sufficient cause is shown, *(See Christ Embassy Zimbabwe* v *Chidziva Investments (Pvt) Ltd* HH 21/11) viz:
    a. Whether or not the default was wilful, in that having full knowledge of the time within which to file its plea, the applicant deliberately and intentionally decided not to do so.
    b. Whether or not the explanation tendered for the default is reasonable, given the circumstances of the case in that what occurred could have happened to a reasonable man.
    c. Whether or not the applicant is *bona fide* in that it does not merely intend to buy time or frustrate the respondent; and
    d. Whether or not the applicant has a good *prima facie* defence on the merits, which raises triable issues.

See *Songore* v *Olivine Industries* (2) ZLR 210, *Ndebele* v *Ncube* 1992 (1) ZLR 288 (S), *Zimbabwe Banking Corporation Ltd* v *Masendeke* 1995 (2) ZLR 400 (S), *Apostolic Faith Mission in Zimbabwe & Others* v *Titus I. Marufu* SC. 28/03, *Bishi* v *Secretary for Education* 1989 (2) ZLR 240 (HC), *Dewera Farm (Pvt) Ltd & Ors* v *Zimbabwe Banking Corporation* 1997 (2) ZLR 47 (H).

3. And while courts frown on plaintiffs who snatch at judgments, the impression must not be created that the rules may be flouted with impunity and that as long as a party is late by a day or two rescission will be granted. (See *Songore (supra*))
4. Were the blame lies with the attorney, condonation will not invariably be withheld, as justice demands that the issues raised must be interrogated fully and that the applicant should not be shut out on a technicality (*Ashanti Goldfields (supra)).* However, the courts also recognize that there is a limit beyond which a litigant will not escape his lawyer's lack of diligence or the insufficiency of the explanation proffered as that may be construed as an invitation to laxity. The lawyer being the litigant's chosen representative, there is little reason to absolve the litigant from the consequences of the lawyer's failure to comply with the rules of court. (See *Kombayi* v *Berkhout* 1988 1) ZLR 53 (SC), *Masama* v *Borehole Drilling (Pvt) Ltd* 1993 (1) ZLR 116 (SC), *Ndebele* v *Ncube* **(**supra)).

Applicant's submissions

The applicant admits that its plea was filed out of time when a bar was already in operation against it, but explains that this was as a result of an oversight by its legal practitioner and his clerk, both of whom have filed affidavits explaining how this "oversight" occurred. It further argues that as soon as it noticed the error on 28 January 2016, it immediately filed this application on 5 February 2016. Therefore the degree of non –compliance was not so great.

Further, the applicant argues that it cannot be said that with full knowledge of the requirement to file its plea timeously, the applicant freely took the decision not to do so, as its legal practitioner had instructed his clerk to file the plea on 11 January 2016, quite within the time limits. Consequently, it has a reasonable explanation for its failure to adhere to the rules and is *bona fide* in seeking to obtain rescission.

The applicant also asserts that it has a *bona fide* defence to the respondents claim, which it has always intended to pursue, and has good prospects of success in that the acknowledgment of debt relied on by the respondent for its claim for provisional sentence does not state the amount of the debt due, and in any event was signed through material misrepresentation. Further, the respondent breached the lease agreement by failing to provide offices at "most" of its service stations but continued to charge rent nonetheless.

Finally, the applicant argues that it has filed a counterclaim which exceeds the amount claimed by the respondent, and which also raises issues which require the respondent to explain.

Consequently the respondent should not be allowed to snatch at judgment, but that the matter should be allowed to be fully ventilated in a trial by a grant of the order sought.

Respondent's submissions

The respondent argues that para 15 of the applicant's legal practitioner's founding affidavit and para 7 of his clerk's supporting affidavit attests to such negligence, inability to act expeditiously and lack of vigilance as to amount to wilful default. It argues that the fact that the lawyer only learnt about the default judgment on 28 January 2016 when following up on a plea to its counterclaim shows a lack of interest in pursuing its defence by the applicant, as it ought first to have ascertained whether its plea had been properly filed of record.

In fact, the respondent argues, the applicant was not even interested to ensure that its counterclaim was properly filed. As it turns out, it was not, as the requisite fee had not been paid. Consequently such lack of diligence ought to be visited on the applicant as wilful default.

Further, the respondent submits that the explanation for the default is not reasonable. It argues that it is not sufficient or acceptable to just claim an "oversight" as an appropriate explanation for the default.

The respondent also submits that the court was entitled to examine the merits of the defence being raised in the plea as well as the substance of the counterclaim to ensure that there is finality in litigation.

In the first regard, respondent argued that, in its plea the applicant raised no defence to its claim on which it could hope to succeed. This was mainly because it did not deny the signature on the acknowledgement of debt, nor show that it had fully paid the debt, which are the only defences allowable where a claim is based on a liquid document.

In addition, the respondent pointed out that it was only the applicant's legal practitioner who raised the issue of misrepresentation on the liquid document, and not the applicant itself. Therefore the respondent argued that it was inappropriate for the legal

practitioner to give evidence for the applicant when he was not present at the time that the acknowledgment of debt was executed.

In any event, the acknowledgment of debt is quite clear on the face of it in that it invited the applicant to confirm the amount of the debt it owed the respondent, and if it disputed it, to advise of any disparity. The applicant spurned this opportunity and signed the acknowledgment of debt without amendment.

Finally, in the second regard, the respondent argued that both the intended plea and counterclaim were vague and embarrassing and therefore expiable in that

a. The plea, particularly at p 19, para 1.4 was a bare denial of the respondent's claim; and
b. The counterclaim, at paras 5 and 6 were so imprecise that it was not clear how many offices, where, and to what rental value were not provided by the respondent.

Application of the law

It is evident that the attempt to file the plea and counter-claim on 12 January 2016 was within the time limits. However, this failed because the applicant did not fulfil the elementary requirement to pay the necessary fee. And because the applicant's attempt was at the 11th hour, it left itself without the opportunity to rectify its mistake within the *dies induciae*.

The effect is that, with full knowledge that his client's plea ought to be filed by 12 January 2016, the applicant's legal practitioner took no steps to ensure that that was done. He merely relied on his clerk to do the right thing, which, as it turned out, the clerk did not do.

However, while I agree that this amounted to grave negligence and lack of diligence, I am not inclined to take the draconian view suggested by the respondent that this amounted to a conscious decision by the applicant not to adhere to the rules. Rather, I will give the applicant the benefit of doubt that, perhaps due to pressure of work or some other reason, its legal practitioner did not more closely supervise his clerk.

While the sins of the legal practitioner may be visited on his client, and in this case, ought to be so visited, for the reason that I am not convinced that the negligence of the legal practitioner amounted to a deliberate and intentional decision not to comply with the rules, I cannot find that the applicant was in wilful default.

Further, with regard to the clerk's assertion and admission that he did not handle the matter with the urgency it deserved and negligently failed to inform his principal of his failure to file the plea and counterclaim on 11 January 2016 as instructed, it seems to me that it does happen that one overlooks certain acts that one ought to do. As far as the legal practitioner is concerned, I believe it is quite normal that sometimes one places too much trust on a subordinate and fails to give closer supervision.

Consequently I am of the view that the explanation of "oversight" sums up these failings and, while I am not condoning this level of negligence, I find the explanation to be reasonable in the normal conduct of business. Certainly, I am not willing to hazard that there was a conscious decision to deliberately refrain from complying with the rules.

In fact I commend the legal practitioner and his clerk for honestly admitting their mistakes and taking responsibility therefore, rather than mislead the court with concocted explanations.

The challenge to the applicant's *bona fides* in mounting this application and to the merits of its defence and the prospects of success thereon is a more serious hurdle for the applicant to surmount.

I do not understand why, when the applicant was fully aware that the time limit within which it had to file its plea and any counterclaim was 12 January 2016, it proceeded to do so on 18 January 2016 when it was already barred. I would have thought that the reasonable litigant would then have filed an application to uplift the bar instead. The applicant's legal practitioner sought to explain this by saying that he only became aware of the bar (and the consequent judgment obtained in default) on 28 January 2016 when he was following up on the plea to the counterclaim.

While the degree of non-compliance from 13 to 18 January 2016 (when the plea was eventually "filed"), seems negligible, the fact remains that applicant did not seek to purge its non-compliance until 5 February 2016 when it filed this application.

Although I am not willing to put too much emphasis on the degree of non-compliance, which in any case must be judged within the context of each particular case, I must say that I am less inclined to forgive this degree of negligence. As properly pointed out by the respondent, it seems that the applicant was more concerned with whether the respondent had filed a plea than in ascertaining whether its own pleadings had been properly

filed. That to me does not measure up to the standard of a litigant who honestly and seriously wishes to pursue his defence. Added to that is the failure by the legal practitioner to appreciate that a fee must be paid to effectively register a counterclaim. For these reasons I cannot therefore state with any conviction that the applicant is *bona fide* in making this application.

Even more problematic for the applicant are the defences it raises and which it claims must be fully ventilated in a trial which it alleges it has prospects to succeed on. Obviously, I must look at the plea to decide whether there is merit in the substance of the defence being raised therein. Further I must assess the substance of the claim in reconvention to decide whether the entirety of the application before me discloses any prospects of success that would merit the upliftment of the bar and rescission of judgment.

Clearly, the respondent's claim is based on a liquid document: an acknowledgement of debt which stipulates the amount that the applicant owes. This was the basis for the granting of an order for provisional sentence in this matter.

Evidently, the judge at that time accepted that the acknowledgment of debt apparently made for audit purposes was sufficient to be defined as a liquid document in this matter. I cannot fault that finding as I am of the same view. It seems to me that it is immaterial what the purpose of the document was. The fact remains that if the applicant did not accept the indebtedness alleged or did not agree with the amount therein, there was no reason for it to have signed the document.

At that time, and even now, the applicant did not and still does not dispute that it signed in acknowledgment of the debt, nor does it allege that it fully discharged the debt. As properly pointed out by the respondent, these are the only valid defences open to the applicant and upon which there would be reasonable prospects of success if proved. Save to make the meaningless statement that it "paid the full rentals owed for the service stations where it (respondent) fulfilled its obligations in terms of the agreement" the applicant has not properly and effectively raised these defences at all in its founding affidavit or in its plea.

As for the allegation that the acknowledgment of debt was signed due to misrepresentation, I consider this to be a futile argument.

Firstly, this allegation is not a defence to a claim based on a liquid document. Besides, it is only being raised by the legal practitioner in these proceedings. The applicant itself never

raised this at the time provisional sentence was granted. The person who signed the acknowledgment of debt is the same person who deposed to an affidavit at the provisional sentence stage and never raised the issue of misrepresentation. (See p 36 of the bundle of pleadings). I cannot accept the evidence of the legal practitioner who did not sign the acknowledgment of debt and was not present at the time of its signature over the evidence of the person directly involved.

Secondly, the acknowledgment of debt is clear on the face of it: the applicant did not have to sign it if it disputed the amount stated therein, but was at liberty to point out any disparity. The applicant chose not to do so, but went ahead and signed the document, thus confirming the amount on the face of the document.

Therefore, even to raise the issue of misrepresentation in the plea would still be fraught for the reasons I have already stated above.

As for the plea itself, I must say that it is extremely unhelpful in establishing defences that raise triable issues which could be successful. In fact, in my view, the plea itself is fertile ground for an exception.

Firstly, the applicant states that "there is no cause for the underlying debt" (para 1.2); and that the respondent "has been paid the full rental owed for the service stations where it fulfilled its obligations in terms of the agreement" (para 1.7), yet no minimum facts are proffered to support these statements. They therefore could be termed bare denials, or vague and embarrassing. For instance, which or how many service stations has rent been paid for and how much was paid, and at which or how many service stations has the respondent failed to fulfil its obligations?

Secondly, the averment that the respondent breached the lease "agreement materially by failing to provide said offices for **several** (my emphasis) of its service stations, making the conduct of the defendant's business very difficult" (see para 1.4 of the plea) suffers, in my view, from the same shortcoming. Surely the applicant ought to know where or at how many service stations respondent failed to provide to avoid such vague averments.

Finally, the court is left to wonder how the claim for unpaid rental amounts to unjust enrichment as alleged in para 1.8 of the plea as no attempt is made to show how respondent could be unjustly enriched.

I therefore find that on the papers, the applicant has not disclosed such *prima facie* defences as would evince reasonable prospects of success should its application be granted, and further that the plea is excipiable.

As for the claim in reconvention, like the plea, it is a non-event as it was filed out of time. In any case there is nothing to stop the applicant from issuing summons for breach should it be so inclined. There is therefore no prejudice that will be suffered by the applicant *vis-à-vis* its counterclaim should I dismiss this application.

In any event, I do agree with the respondent that it has reasonable grounds to except to this counterclaim with good prospects of success. That the respondent failed to provide offices to the applicant at "most of the service stations" or "at some of its sites" is certainly vague enough not to clearly reveal a sound cause of action.

To compound the problems with the counterclaim, in one breath, the applicant argues that offices were not provided. In the next breath, it says it conducted minimal business at the same sites were offices were not provided. There is no explanation of what is meant by "minimal business" or how it was conducted where there were no offices, or what were "improper working conditions" There is no quantification of the "major losses" that were incurred, or how the amount of $9 374 735-50 was arrived at.

In *casu*, I would be remiss to uplift the bar and grant rescission to allow such a plea and counterclaim to be filed when I can clearly see that it is excipiable. In fact, the standard of these documents question the *bona fides* of the application itself. While I agree that the court should not do injustice to litigants and should normally allow the ventilation of matters on the merits to reach finality in litigation on the substance of disputes, I am convinced that the applicant falls squarely within the confines of MCNALLY JA's statement in *Ndebele* v *Ncube (supra)* at 290 C-E when he said

> "But it must be observed that that in recent years applications for rescission, for condonation, for leave to apply or appeal out of time, and for other relief arising out of delays either by the individual or his lawyer, have rocketed in numbers. We are bombarded with excuses for failure to act. We are beginning to hear more appeals for charity than for justice. Incompetence is becoming a growth industry. Petty disputes are argued and then reargued until the costs far exceed the capital amount in dispute. The time has come to remind the legal profession of the old adage **vigilantibus non dormientibus jura subveniunt**. Roughly translated, the law will help the vigilant but not the sluggard."

I would add that this matter is not merely one involving a litigant who lacks vigilance, but one who also does not have a legal leg to stand on.

While I am inclined to accept the applicant's explanation for its failure to comply with the rules, and adjudge its default as not wilful, I cannot believe the degree of non-compliance to be negligible given the circumstances of the case. Further, I question the *bona fides* of the applicant and find that find that it does not have a good prima facie defence to respondent's claim. Nor do I believe that there is any pressing jurisprudential point that warrants that the matter should go to trial.

In the result, I do not consider it to be fair to both parties and in the interests of justice to condone the applicant's default as there are no prospects of success in the main matter.

Consequently, I am convinced that the applicant has not proved good and sufficient cause to have the bar uplifted or to merit rescission of the default judgment granted against it.

In passing, it seems to me that by stating in its founding affidavit and in its heads of argument that the respondent does not have a cause of action, the applicant has procedurally confused itself as it appears to be raising an exception in an application for upliftment of the bar and rescission of judgment.

Costs

The respondent requested costs on the higher scale, but did not advance any reasons or legal arguments why I should order such punitive costs". I am therefore not inclined to grant its request.

DISPOSITION

In the result, it is ordered that the application for upliftment of the bar and rescission of judgment granted in HC 8629/15 on 20 January 2016 is dismissed with costs.

Messrs Mawere Sibanda, applicant's legal practitioners
Chiturumani Law Cha mbers, respondent's legal practitioners